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CONSTITUTIONALISM AND JUDICIAL RULEMAKING: LESSONS FROM THE CRISIS IN MISSISSIPPI

William H. Page*

I. INTRODUCTION

One of the most persistently troublesome questions in the doctrine of separation of powers in this century has been whether courts have an inherent, suprastatutory authority to adopt procedural rules.[1] Some have argued that the procedural rulemaking power is inherently legislative and cannot even be delegated to the courts;[2] others have argued that the power is inherently judicial, and that all legislation concerning procedural rules is unconstitutional.[3] In recent years, the extreme positions have disap-

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1. Early in the century, Roscoe Pound drew attention to the issue in a speech to the American Bar Association, reprinted as *The Rule-Making Power of the Courts*, 12 A.B.A. J. 599 (1926). Interest has been kept alive by periodic controversies in the states. *See, e.g.*, Kaplan & Green, *The Legislature's Relations To Judicial Rulemaking: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234 (1951); Kay, *Rulemaking Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV. 1 (1975); McCormick, *Legislature and Supreme Court Clash on Rule-Making Power in Colorado*, 27 ILL. L. REV. 664 (1933); Note, *The Court v. The Legislature: Rule-Making Power in Indiana*, 36 IND. L.J. 87 (1960); Note, *Bounds of Power: Judicial Rulemaking in Illinois*, 10 LOY. U. CHI. L.J. 100 (1978).

2. *E.g.*, Walsh, *Rule-Making Power on the Law Side of Federal Practice*, 13 A.B.A. J. 87 (1927).

3. Wigmore, *All Legislative Rules for Judiciary Procedure are Void Constitutionally*, 23 ILL. L. REV. 276, 277 (1927). Other writers who have supported an inherent power are Franck, *Practice and Procedure in Mississippi: An Ancient Prescription for Modern Reforms*, 43 MISS. L.J. 287 (1972); Gertner, *The Inherent Power of Courts to Make Rules*, 10 U. CINN. L. REV. 32 (1936); Panter, *The Inherent Power of Courts to Formulate Rules of Practice*, 29 ILL. L. REV. 911 (1935); Pound, *supra* note 1; Robinson, *Self-Help or Self-Destruction? The Rulemaking Power*, 9 ROCKY MTN. L. REV. 122 (1937); Wheaton, *Courts and the Rulemaking Powers*, 1 MO. L. REV. 261 (1936).

peared from the scholarly literature;[4] and the Congress and most states have adopted pragmatic rulemaking structures in which the court system initiates the process but ultimate authority remains with the legislature.[5] Some courts, however, have persisted in asserting an inherent, suprastatutory rulemaking power;[6] and a significant number of states have ceded their courts such a power by constitutional amendment.[7] The Mississippi Supreme Court has recently adopted a version of the Federal Rules of Civil Procedure against the express wishes of the state legislature, asserting a pro-power position that is among the most extreme ever adopted by an American court of last resort.[8] Its position falls only slightly short of the most extreme possible position.[9] The court's action has precipitated a constitutional crisis in Mississippi[10] and affords an appropriate occasion for a new analysis of the problem.

There is a vast literature on this subject.[11] If my work sheds new light, it is because I bring to this problem a perspective derived from the institutional analytics of the administrative process.[12] Most writers on this topic have either been proceduralists[13] or judicial administrators,[14] many of whom were deeply involved in the existing structures of procedural rulemaking. Others have been

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4. *See* J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 79 (1977): "No serious student of the subject would today accept Wigmore's thesis that the legislature has no power to effect [sic] judicial procedure."; C. GRAU, JUDICIAL RULEMAKING: ADMINISTRATION, ACCESS AND ACCOUNTABILITY 14 (1978): "The consensus in the literature is that there should be legislative involvement in procedural rulemaking." Among those writers insisting on some form of ultimate legislative control of rulemaking are J. WEINSTEIN, *supra;* Kaplan & Greene, *supra* note 1; Kay *supra* note 1; Levin & Amsterdam, *Legislative Control Over Judicial Rulemaking: A Problem in Constitutional Revision,* 107 U. PA. L. REV. 1 (1958); Sunderland, *The Regulation of Procedure by Rules Originating in the Judicial Council,* 10 IND. L.J. 202 (1934); Warner, *The Role of Courts and Judicial Councils in Procedural Reform,* 85 U. PA. L. REV. 441 (1937); Williams, *The Source of Authority for Rules Affecting Procedure,* 22 WASH. U.L.Q. 459 (1937).

5. See text accompanying notes 152 to 155, *infra.*

6. *See* note 157, *infra.*

7. *See* note 65, *infra.*

8. Order of May 26, 1981, 395-97 So. 2d, Miss. Cases 1 (1981) [hereinafter order of May 26, 1981], reprinted in MISSISSIPPI STATE BAR, MISSISSIPPI RULES OF CIVIL PROCEDURE (1981), [hereinafter cited as Rules Pamphlet]. *See* Section IV, *infra.*

9. The court did concede the legislature the power to "suggest" rules of procedure. Newell v. State, 308 So. 2d 71,76 (Miss. 1975).

10. *See* Section II, *infra.*

11. *See* notes 1, 3, and 4, *supra.* There is also a useful nine page bibliography in C. GRAU, *supra* note 4, at 77-85. For compilations of constitutional, statutory, and case law see C. KORBAKES, J. ALFINI, C. GRAU, JUDICIAL RULEMAKING IN THE STATE COURTS: A COMPENDIUM (1978); Annot., 158 A.L.R. 705 (1945); Annot., 110 A.L.R. 22 (1933).

12. See Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum,* 61 B.U.L. REV. 1095 (1981).

13. *E.g.,* J. WEINSTEIN, *supra* note 4.

14. *E.g.,* C. GRAU, *supra* note 4.

frustrated procedural reformers.[15] There may be some value in viewing these questions from the point of view of a broader concern with the problems of constitutionalism and the separation of powers.[16]

I begin with a brief review of the major turning points of the crisis in Mississippi[17] and a restatement of the asserted bases for the supreme court's action.[18] I then analyze these bases individually[19] and conclude that there is a basic inconsistency in the court's assertion of a rulemaking power based on the constitutional delegation of the judicial power to the courts. The judicial power does not involve exclusive governmental authority over any subject area, even if the area is the conduct of the courts themselves; it is a power to decide individual cases and controversies.[20] It does involve a power simultaneously to make law, but always subject to legislative supremacy.[21] In adopting, without legislative approval, a code of procedural rules the court has violated these fundamental criteria of the legitimacy of judicial action. Furthermore, it is wrong to say that the subject matter of procedural rules is purely a matter of judicial concern.[22] Rules exist as a means of enforcing substantive rights, and it is essential to the legislature's undisputed authority to create and define substantive rights that it have final control, within the bounds of due process, over the means by which such rights are enforced.

My argument does not question the merits of the Rules themselves, which I believe are a major improvement over the prior practice. Nor do I in any way defend the intransigence of the legislature in the area of procedural reform, an intransigence that quite understandably provoked the court to adopt the Rules. But constitutional processes are not matters of arid theory; significant departures from recognized standards of legitimacy in governmental action will ultimately cause serious practical difficulties. Procedural reform is a continuing process and requires a recognized structure of legitimacy to support it. I therefore conclude my argument with some general suggestions for an administrative rulemaking structure that combines the expertise of the judiciary with the lawmaking authority of the legislature.

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15. *E.g.*, Franck, *supra* note 3, Pound, *supra* note 1.
16. In this respect, my work most closely resembles Kay, *supra* note 1.
17. *See infra* Section II.
18. *See infra* Section III.
19. *See infra* Section IV, V, VI.
20. *See infra* Section V(A).
21. *See infra* Section V(B).
22. *See infra* Section VI.

II. BACKGROUND

Until the last ten years, there was no serious controversy in Mississippi over the placement of the power to adopt procedural rules: it was generally conceded that it lay with the legislature. From the earliest days of statehood, common-law procedures have been subject to legislative revision;[23] and since 1857, procedure has been governed in the circuit and chancery courts primarily by statute.[24] The system prescribed by this succession of statutes defies easy categorization. It contains several elements of the Field Code that were adopted in this state in 1850[25] but also preserves many features of common law and equity procedures.[26] And, of course, the state constitution prescribes the continued separation of courts of law and equity.[27]

The legislature repeatedly rebuffed attempts to modernize state-court procedures, leaving reformers at a loss. But, in 1972, a self-confessedly tendentious article[28] argued that the state supreme court should undertake to reform the state's procedural rules on its own inherent constitutional authority. The supreme court in 1975 cited that article with approval in *Newell v. State*,[29] the case the court now claims laid the precedential foundation for its action in adopting the new rules.[30]

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23. The Circuit Court Act of 1822 included, *inter alia*, a provision permitting defendants to raise several pleas, *see* MISS. CODE ch. 59, art. 1, § 49 (1848); provisions requiring plaintiffs in action of indebitatus assumpsit, and defendants in pleas of payment and of set-off to file detailed accounts, *id.*, *at* §§ 60-61; and provisions regulating amendments to pleadings before and after verdicts, *id.*, at §§ 91, 92, 93, and 99. Other significant amendments to common law practice were adopted in 1823, 1824, 1828, 1830, 1836, 1837, 1838, 1840, 1842, and 1846. *See* MISS. CODE, ch. 59, arts. 2-13 (1848).

24. Every codification of Mississippi statutes since 1857 has contained a procedural code for circuit and chancery courts. MISS. CODE ANN. §§ 11-7-1 to 11-7-221 (1972) (Circuit), MISS. CODE ANN. §§ 11-5-1 to 11-5-167 (1972) (Chancery); MISS. CODE ANN. §§ 1394-1565 (1942) (Circuit), MISS.CODE ANN. §§ 1215-1393 (1942) (Chancery); MISS. CODE ANN. §§ 473-621 (1930) (Circuit), MISS CODE ANN. §§ 318-472 (1930) (Chancery); MISS. CODE ANN. §§ 438-631 (1927) (Circuit), MISS. CODE ANN. §§ 243-432 (1927) (Chancery); MISS. CODE §§ 426-616 (1917) (Circuit), MISS. CODE §§ 238-420 (1917) (Chancery); MISS. CODE ch. 20 (1906) (Circuit), MISS. CODE ch. 19 (1906) (Chancery); MISS. CODE ch. 21 (1892) (Circuit), MISS. CODE ch. 20 (1892) (Chancery); MISS. CODE ch. 58 (1880) (Circuit), MISS. CODE ch. 59 (1880) (Chancery); MISS. CODE ch. 8 (1871) (circuit), MISS. CODE ch. 9 (1871) (Chancery); MISS. CODE ch. 61 (1857) (Circuit), MISS. CODE ch. 62 (1857) (Chancery).

25. *See, e.g.*, MISS. CODE ANN. § 11-5-13 (1972) (conventional statement of requirements for sufficiency of a complaint).

26. *See, e.g.*, MISS. CODE ANN. § 11-5-7 (1972) (chancery practice "shall be the same as heretofore practiced by said courts, except as modified by law.")

27. *See, e.g.*, MISS. CONST., art. VI, §§ 156, 159.

28. Franck, *supra* note 3.

29. 308 So. 2d 71, 76 (Miss. 1975).

30. In re: Mississippi Rules of Civil Procedure, 410-16 So. 2d, Miss. Cases xxi (1982) (order rescinding rules 4 and 14) [hereinafter order of March 8, 1982]; Letter from the Mississippi Supreme Court to Mississippi State Senate (Nov. 24, 1981) (attached memorandum in response to Senate Concurrent Resolution No. 503) [hereinafter Response]; Order of May 26, 1981, *supra* note 8.

Newell held unconstitutional a state statute that purported to prohibit a trial judge from instructing the jury except at the request of either party. As I will argue later, the case's precise facts are less important than its sweeping claim that the constitutional grant of the state's judicial power to the court "leaves no room for a division of authority between the judiciary and the legislature as to the power to promulgate rules necessary to accomplish the judiciary's constitutional purpose."[31] On the basis of this claim, the court asserted an "inherent power to prescribe rules of procedure . . . ."[32]

Newell was apparently taken by the legislature as a warning that the court was prepared to act on its own to correct what it perceived as the inadequacies of existing procedural statutes. In the same year, the legislature enacted a version of the federal discovery rules, its first major procedural reform since 1948.[33] Simultaneously, the legislature enacted a statute resembling the Federal Rules Enabling Act, which delegated the rulemaking authority to the supreme court and established an advisory committee to develop a proposed set of Rules of Civil Procedure.[34] Contrary to the *Newell* framework, however, the statute provided for a veto power in the judiciary committees of the state legislature.[35]

The Advisory Committee distributed a preliminary draft of the new Rules in July 1977, requesting comment by the bench and bar, and during the following two months held hearings on the Rules throughout the state.[36] After hearing a number of suggestions, the Committee revised the proposed draft and published the final version in May 1978. Again, the Committee distributed the rules, this time to every member of the bar, asking them to comment and to suggest revisions. In January 1979, the court itself held two days of hearings and then approved the rules without further modification.

Pursuant to the 1975 rulemaking act, the court submitted the rules to the legislature in September 1979. They were rejected,

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31. 308 So. 2d at 77.

32. *Id.* at 78.

33. 1975 Miss. Laws, ch. 501 §§ 1-14 (Codified in MISS. CODE ANN. §§ 13-1-226 to 243 (Supp. 1982)).

34. 1975 Miss. Laws, ch. 501 §§ 15-19 (Codified in MISS. CODE ANN. §§ 9-3-61 to 69 (Supp. 1982)).

35. 1975 Miss. Laws, ch. 501 § 20 (Codified in MISS. CODE ANN. § 9-3-71 (Supp. 1982)).

36. The work of the committee is described in Abbott, *The Proposed Mississippi Rules of Civil Procedure—An Argument for Adoption*, 49 MISS. L.J. 285 (1979), and Response, *supra* note 30, at 4-5.

after unrecorded legislative hearings, by the judiciary committee of the House of Representatives. The House Committee did informally suggest, however, certain revisions in the rules; and after a new round of negotiations involving several segments of the bar, a revised draft was submitted to the judiciary committee of the Senate. That committee also rejected the bill in October 1980. No further funds were appropriated to support the Advisory Committee.[37]

That would normally have been the end of it.[38] But on May 26, 1981, the court, acting on its own motion, adopted the May 1978 draft of the rules to become effective for cases filed on or after January 1, 1982.[39] Five justices voted in favor of the May 26 order, and Justice Walker concurred specially.

A similar bold stroke by the Supreme Judicial Court of Massachusetts led quickly to an accommodation with that state's legislature on the rulemaking power.[40] But, perhaps because the Mississippi court's action came on the heels of an explicit legislative rejection of the rules, the initial response in Mississippi was a direct confrontation. Rumors circulated immediately that the legislature was contemplating the removal of pro-Rules justices from the court using a near-forgotten provision of the state constitution.[41] By concurrent resolution, the legislature formally requested the court to rescind its order of May 26 to allow legislative reconsideration of the constitutional questions raised by the court's action.[42] In a response barely one month before the

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37. Response, *supra* note 30, at 5-6.

38. Nebraska's legislature gave rulemaking authority to its court in 1939, "but when the court proposed a battery of rules to the legislature in 1943, the legislature rejected the rules and repealed the enabling act." Levin & Amsterdam, *supra* note 4, at 7 n.36.

39. Order of May 26, 1981, *supra* note 8. There was some initial confusion whether the version of the rules adopted was the May, 1978 draft or the amended draft that was submitted to the Senate Judiciary Committee.

40. Despite its limited express rulemaking authority, the Supreme Judicial Court promulgated a complete set of civil rules in 1973 under a claimed "inherent" power:

> However, the legislature took issue with quite a few of the rules promulgated by the court and thereafter enacted statutes directly in conflict with these provisions. After having enacted these rules, and prior to sending them to the governor for signature, the legislature (under a constitutional provision allowing for advisory opinions) sent their statutes to the court in order to determine their validity. The court, however, chose not to issue any such advisory opinion, finding the point to be "moot" since the legislature was then out of session. Thereafter the court and legislature, acting jointly, enacted new Rules of Civil Procedure which were not conflicting and met with the statisfaction of both parties in this "confrontation".

American Judicature Society, Uses of the Judicial Rule-Making Power 123-24 (1974) (mimeograph).

41. MISS. CONST. art. IV, § 53.

42. Miss. S. Con. Res. 503, 1981 First Extraordinary Sess.

new Rules' effective date, the court rejected the legislature's request and reaffirmed the court's constitutional authority.[43]

On January 1, 1982, the Rules became effective. The legislature immediately began to consider a proposal to remove the pro-Rules justices.[44] The Senate also passed and sent to the House a concurrent resolution proposing a constitutional amendment that would have limited the supreme court's rulemaking power to submitting proposals to the legislature "in such manner as the Legislature shall determine by general law."[45]

At the same time, both houses passed bills that would have required submission of court-made rules for legislative approval. The Senate version, however, would have required approval of all rules "heretofore or hereafter"[46] proposed by the court, while the House version would have applied only to rules "hereafter" proposed,[47] thus ratifying the new Rules.

One of the wild cards in the conference committee's consideration of the bills was the threat that the Senate could pursue removal of pro-Rules justices if the House conferees refused to agree to the more sweeping Senate version. Adding to the controversy, a new supreme court justice reportedly wrote a letter to all members of the Senate Judiciary Committee stating that the court would retreat from its position of the order of May 26 and the response and would submit to the terms of the Senate bill.[48] The pending legislation and the new justice's letter were reportedly the subject of several meetings of the court and between the court and several key legislators.[49]

Finally, in late February, the Senate bill, which had passed that house by a vote of 48 to 1, was passed by the House of Representatives by a vote of 108 to 6.[50] The Governor allowed

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43. Response, *supra* note 30, (Walker, J., concurring). Justice Walker stated that,

> [I]n a democracy such as ours, no authority or power which directly or indirectly affects substantial rights of citizens should be unbridled, without restriction and without input by the other two branches of government. I would, therefore, propose that an accord be reached with the Legislature, that if the Legislature should enact legislation, duly approved by the Governor, nullifying or amending any particular rule, then such rule would stand nullified or amended unless the Supreme Court readopted the rule with a statement in writing of the rule's necessity to the administration of justice.

44. The Daily Mississippian, Feb. 26, 1982, at 2, col. 2.

45. Miss. S. Con. Res. 534, 1982 Regular Sess.

46. Miss. S. 2714, 1982 Regular Sess. § 2(2),(3).

47. Miss. H. R. Amendment to Miss. S. 2714, 1982 Regular Sess. § 2(2).

48. The Daily Mississippian, Feb. 26, 1982, at 2, col. 3.

49. *Id.*

50. Letter from Governor William F. Winter to the Mississippi Senate (March 3, 1982) (discussing Miss. S. 2714).

the bill to become law on March 3 by his failure to sign it during the five-day constitutional period. In a message to the Senate, the governor stated that:

> I have discussed this matter with members of the Legislature, members of the Supreme Court and both officers and members of the Mississippi State Bar. I believe that out of those discussions has come a consensus that the course of letting this bill become law will have the effect of reconciling some if not all of the differences of opinion which have existed and will help to bring this long debate over the rules to a reasonable conclusion.[51]

The supreme court responded to the new legislation in a way that suggested that the prior conferences among the three branches of state government had resulted in an uneasy compromise. In an order of March 8, the court transmitted a modified version of the Rules to the legislature for approval according to the terms of the new legislation.[52] At the same time, however, the court claimed that its authority to promulgate procedural rules had been "recognized" by the legislature by the enactment of the new legislation.[53] It nonetheless transmitted the Rules, pursuant to the legislation, "in a spirit of cooperation between this court and the Legislature," and further requested that the legislature "submit to this Court its comments and recommendations" on the Rules.[54] The court continued:

> Upon receipt of a concurrent resolution reported out by the Judiciary Committee of the Senate and House of Representatives and duly passed by the Senate and House of Representatives, this Court will give immediate attention to such resolution and report to those bodies whether the Court has adopted or rejected the resolution. In making our judgment, we will give great weight to the resolution of the Legislature and consider it in the light of whether it accords with the orderly administration of justice. The Mississippi Rules of Civil Procedure, as amended, shall remain in full force and effect until further order of this Court.[55]

By this unusual recasting of the legislation—reading it, contrary to the legislature's evident purpose, to recognize the court's authority in rulemaking, the court was able to follow the statute's formal process without abandoning its newly asserted constitutional power. As if to suggest its willingness to cooperate, the court ordered the deletion of rule 14 governing third-party practice, and rule 4 establishing new procedures for service of process.[56] No explanation was given for the action.

The consideration of the Rules in the legislature focused on

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51. *Id.*
52. Order of March 8, 1982, *supra* note 30, at 1.
53. *Id.*
54. *Id.* at 2.
55. *Id.*
56. *Id.* at 3.

the merits of several controversial provisions. Ultimately, the legislature disapproved seven of the rules,[57] some on the grounds that they affected substantive rights,[58] others on the grounds they were costly and ineffective.[59]

The court has not, at this writing, formally responded to the legislature's action. It did, however, send letters to all of the state's trial judges reaffirming the rules and strongly asserting its rulemaking authority.[60]

III. The Reasoning of the Court

A. *Newell v. State*

The court adopted the rules "[p]ursuant to the inherent authority vested in this Court by the Constitution of the State of Mississippi, as discussed in *Cecil Newell, Jr. v. State of Mississippi.*"[61] Because of the reliance the court places on this case, it is worth analyzing in some detail.

Newell was a criminal prosecution for assault with intent to kill. The defendant was convicted and argued on appeal that the trial court had refused to give a proper instruction on the issue of reasonable doubt proffered by the defendant.[62] The supreme court found the instruction in issue to be defective on the ground that it failed to describe the elements of the crime.[63] Nonetheless, the court reversed and remanded for a new trial.[64] A state statute of 1857 vintage[65] had precluded the trial judge from instructing the jury on its own motion, and the parties had refused the judge's request to submit amended instructions.[66] Because this necessarily left the jury uninstructed on the issue of reasonable doubt, the court found the statute invalid.[67]

The court's reasoning in reaching this conclusion is fascinating. One part of the court's opinion makes a plausible case

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57. The rules were Miss. Rules of Civil Procedure 3, 12, 13, 41, 55, 56, and 83. *See* Miss. S. Con. Res. 617, 1982 Regular Sess.

58. The resolution stated that the compulsory counterclaim provision of Rule 13 would "adversely affect the substantive rights of litigants in divorce actions" among others. Miss. S. Con. Res. 617, 1982 Regular Sess.

59. The resolution stated that the summary judgment process of Rule 56 "could result in substantial additional costs and delays . . . ." *Id.*

60. The Clarion-Ledger, April 8, 1982, at 3A, col. 1.

61. Order of May 26, 1981, *supra* note 8.

62. 308 So. 2d 71 (Miss. 1975).

63. *Id.* at 73.

64. *Id.* at 78.

65. Miss. Code, ch. 61, art. 161 (1857) (current version at Miss. Code Ann. §§ 11-7-155, 99-17-35 (1972)).

66. 308 So. 2d at 74.

67. *Id.* at 78.

that the statute in question was the relic of a bygone era, inconsistent with modern conceptions of justice:

> The lingering prospect of a return to the tyranny of the King's Court or the blighting of pure democracy by permitting a judge's voice in jury instructions, probably motivating the legislation in 1857, is presently mere obsolescence [sic]. The vantage point afforded by 118 years of legal history characterizes the limiting terms of the legislation directing that instructions emanate only from the parties to have been a mistake of such magnitude that we now consider it of our own motion.[68]

The court emphasized the cost in new trials required by the statute[69] and the obstructions it raised to the administration of justice:

> The deficiency of the statute is that many times it has permitted a lay jury to decide cases from the evidence without being instructed as to the law. On occasion juries have been left uninstructed due to the oversight, omission or ineptness of attorneys. More frequently, however, it is the result of advocates manuevering for their client's best advantage since self-interest is the motivating factor of the adversary system. Regardless of the reason the fact remains that juries are at times left groping blindly, though honestly, for the law of a case to aid them in arriving at a verdict when their oath requires only that they decide such issues from the evidence.[70]

All of this would lead the reader to expect the court to hold the statute to be unconstitutional because it is unfair and costly. Several stray passages in *Newell,* in fact, seem to suggest this was indeed the court's rationale. At one point, the court states that the statute "contravene[s] the constitutional mandates imposed upon the judiciary for the fair administration of justice . . . . [T]he framers of our constitution never intended that a judge be so shackled by legislative statute that he become totally dependent upon the requests of litigants so that he might perform his constitutional duty."[71] This language seems to imply that the constitutional infirmity of the statute was that it hindered the fair administration of justice. There would be nothing particularly novel in such a finding. Courts are the traditional guardians of due process, and where procedural statutes have not conformed to the notions of due process, courts have not hesitated to invalidate them.[72] The federal courts, especially in the area of criminal procedure, have assumed an inherent "supervisory" authority to prescribe rules in individual cases, even if not required by due

68. *Id.* at 76.
69. *Id.* at 74.
70. *Id.*
71. *Id.* at 77-78.
72. *See, e.g.*, Green v. Lindsey, _____U.S._____, 102 S. Ct. 1874 (1982). *See also* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (notice). *See also* North Georgia Finishing Inc. v. Di-Chem., 419 U.S. 601 (1975); Fuentes v. Shevin, 407 U.S. 67 (1972) (provisional remedies).

process or some Bill of Rights requirement.[73] It has also been argued recently that courts should have a common law authority to alter "obsolete" statutes, although this argument contemplates that legislatures would have authority to override the court's action by reenacting the statute.[74]

Another part of the opinion indicated, however, that the court intended to claim an "inherent power" over procedure that went well beyond any of those approaches. Here, the court asserted complete authority over rulemaking based upon the separation of powers provisions of the state constitution. The vesting of the judicial power in the state's courts "leaves no room for a division of authority between the judiciary and the legislature as to the power to promulgate rules necessary to accomplish the judiciary's constitutional purpose."[75] In other words, the power to make rules of procedure is inherent in the judicial power; since the statute in question dealt with procedure, it was unconstitutional. The court's analysis in this part of the opinion seems as simple and as bold as that. Conspicuously, the court cited no authority for this proposition other than the state constitution[76] and three Mississippi cases, none of which squarely supported the position taken.[77] The court made no attempt to answer the reasoning of the overwhelming majority of American courts that no such sweeping power exists in the judiciary by virtue of the judicial power.[78]

The only reasoning the court offered in support of its breathtaking assertion of power was in two passages. First:

> The procedural changes needed to meet the needs of a particular era and to maintain the judiciary's constitutional purpose would be better served, we believe,

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73. *See* Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181 (1969); Note, *The Judge-Made Supervisory Power of the Federal Courts*, *53* GEO. L.J. 1050 (1965). For a rare and dubious application in the civil area, see Thiel v. Southern Pac. Co., 328 U.S. 217 (1946) (routine exclusion of wage-earners from jury held invalid).

74. G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

75. 308 So. 2d at 77.

76. *Id.* (citing MISS. CONST. art. I, §§ 1, 2, 144, 146, 155).

77. *Id.* at 76. (Citing Matthews v. State, 288 So. 2d 714 (Miss. 1974); Gulf Coast Drilling & Exploration Co. v. Permenter, 214 So. 2d 601 (Miss. 1968); and Southern Pacific Lumber Co. v. Reynolds, 206 So. 2d 334 (Miss. 1968)). *Southern Pacific* by its express language, "[did] not involve any issue concerning the Supreme Court's power to make rules of practice for a trial courts." 206 So. 2d at 336 n. 3. Furthermore, far from being inconsistent with a procedural statute, the trial court's rulemaking was held to be authorized by statute. *Id.* at 336. *Gulf Coast Drilling & Exploration Co.* can be distinguished on the same grounds. It is true, however, that the court's footnote 3 in *Southern Pacific* lays the groundwork for *Newell* by its approving citations of Pound, *The Rule-Making Power of the Court*, 12 A.B.A. J. 599 (1926), and R.E.W. Constr. Co. v. District Court, 88 Idaho 426, 400 P.2d 390 (1965). The third case, *Matthews*, contains many phrases that prefigure *Newell*, and did involve the overturning of a procedural statute. In *Matthews*, however, the statute in question prescribed the procedure of the supreme court.

78. *See infra* text accompanying notes 148-151.

> if promulgated by those conversant with the law through years of legal study, observation and actual trials in accord with their oaths rather than by well-intentioned, but over-burdened, legislators of other pursuits and professions.[79]

This is the core of what I will refer to as the "instititional competence" argument: the court has the rulemaking power as a matter of consitutional law because it knows more about the subject. The other key passage is the following: "[T]here is no more reason to support legislative control of court procedures than there would be to uphold court supervision of the procedures by which the legislative and executive departments discharge their constitutional duties."[80] This is the "judicial independence" rationale for the rulemaking power: each branch of government has the authority to prescribe its own rules of governance, and none can presume to intrude on this function in a coordinate branch.

If, however, the court has the exclusive authority over rulemaking that these passages appear to claim, why did it spend so much effort in the rest of the opinion demonstrating the unfairness of the statute in question? This is the key problem of interpretation that has divided the court. The majority has taken the most sweeping view that the court indeed has exclusive authority over rulemaking. Justices Roy Noble Lee, Broom, and Bowling, however, have interpreted the first part of *Newell,* which described the unfairness and inefficiency of the statute, as a crucial limitation on the "inherent power" over procedure asserted in the case.[81] In their view, that power extends only to overturning statutes that impair the fair administration of justice.

This problem of reconciling the two parts of the opinion is most apparent in the following passage:

> [A]s long as rules of judicial procedure enacted by the legislature coincide with fair and efficient administration of justice, the Court will consider them in a cooperative spirit to further the state's best interest, but when, as here, the decades have evidenced a constitutional impingement, impairing justice, it remains our duty to correct it.[82]

The phrase "constitutional impingement, impairing justice" suggests that the statute is unconstitutional because it impairs justice; this supports the minority's view of *Newell.* The remainder of the passage, however, suggests that the court is retaining the full authority over procedure, as the majority now asserts, but will nonetheless apply fair and efficient procedural statutes as a mat-

79. 308 So. 2d at 76.

80. *Id.* at 77.

81. *See* Justice Roy Noble Lee's dissent from the Order of May 26, 1981, *supra* note 8, at 4, and from the Response, *supra* note 30.

82. 308 So. 2d at 78.

ter of discretion. Read as a whole, I believe the opinion most strongly supports the majority's interpretation,[83] and *Newell's* progeny, predictably, also take this view.[84]

B. *The Response*

The adoption of the Rules by the order of May 26 was a very different act from the modification of the single rule governing instructions to the jury in *Newell.*[85] The Rules Pamphlet featured an appendix of "Statutes Affected,"[86] which were "supplanted," "[t]o the extent [they] prescribe rules of civil practice or procedure . . . in all actions not excepted by these rules."[87] The Rules were adopted without a finding that the statutes affected by them actually impaired the administration of justice. Although occasional advisory committee notes to individual rules criticized the prior statutory practice, there was nothing like the lengthly recitation of abuses in *Newell.* Too, the legislature had very recently and very clearly expressed its disagreement with the Rules, while in *Newell* the legislature had been silent. Finally, the court acted by fiat rather than through some version of the common law method; it adopted a comprehensive code of rules applicable in circuit, chancery, and county courts.

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83. This interpretation, however, raises a conceptual problem: how can a statute be invalid as enacted by some illegitimate authority and yet be binding? It may be that the court meant that the legislature has a kind of secondary, general rulemaking authority stemming from the constitution itself—as, for example, the court has to make common law substantive rules that are valid until superseded by statute. Procedural statutes, under this view, would be valid until superseded by rule. But at some points, the court claims that it has *all* the rulemaking authority: there is "no room for a division of authority" in this area. 308 So. 2d at 77. Similarly, the court refers at one point to "legislative suggestions concerning procedural rules." *Id.* at 76. The term "suggestions" indicates that the legislature has no power of its own in the area of procedure. Furthermore, the court's disposition of the case before it is inconsistent with this interpretation: the court reversed the guilty verdict and ordered a new trial under the modified rule. *Id.* at 78. It could not have done so if the 1857 statute had been valid until superseded, since that statute would have been properly binding on all the parties at the time of the trial.

It is possible that the supreme court was claiming that it can, under *its* rulemaking authority, legitimate all preexisting procedural statutes by implicity delegating rulemaking authority to the legislature, subject to a requirement that the statutes be fair and efficient. The court's action in *Newell,* under this view, was merely to find the legislature's action *ultra vires.* This interpretation would explain the court's discussion of the unfairness and inefficiency of the rule and the court's reference in the above quoted passage to its "constitutional impingement." The court was saying that the rule was unconstitutional *not* because it was a violation of due process but because it regulated procedure by means inconsistent with the authority delegated to the legislatue by the court.

84. *See, e.g.,* Jackson v. State, 337 So. 2d 1242, 1253 (Miss. 1976); Brown v. City of Water Valley, 319 So. 2d 649, 650-51 (Miss. 1975); Scott v. State, 310 So. 2d 703, 705 (Miss. 1975); Haralson v. State, 308 So. 2d 222, 223-24 (Miss. 1975).

85. It also differed from the adoption of the MISSISSIPPI UNIFORM CRIMINAL RULES OF CIRCUIT COURT PRACTICE, 370-74 So. 2d Miss. Cases xxii (1979). *See* Usry v. State, 378 So. 2d 635, 638-39 (Miss. 1979). These rules were adopted on the application of the state's circuit court judges, and do not conflict with existing procedural statutes.

86. MISS. R. CIV. P., 395-97 So. 2d, Miss. Cases 9, 201-211 app.

87. MISS. R. CIV. P. 81 (h).

One would think that such a radical change in the nature of the Rules and in the manner of their adoption would require a new exposition of the court's authority. The closest the court has ever come to this is its Response to Senate Concurrent Resolution No. 503. That document, however, does nothing more than cite *Newell* as "precedent" for its authority:

> Without legal doubt, the Mississippi Supreme Court had the authority through legal precedent to prescribe rules of civil procedure for the courts of this state without fear of comminution in order to promote justice, uniformity, and efficiency. Having the authority as well as the desire to cooperate with a separate department of government, the question remained as to whether the Court should exercise it.[88]

The Response, then, was not aimed at offering new reasoning in support of the authority to adopt the Rules; it relied entirely on *Newell* for that. Instead, it sought to justify its exercise of discretion in using that authority. To that end, it recounted the need for procedural reform,[89] the labors of the advisory committee in preparing the Rules,[90] and finally the intransigence of the legislature in refusing to adopt the Rules:[91]

> The comprehensive implementing legislation to the rulemaking power of the Court, Section 9-3-61, et. seq., was followed in meticulous detail until it became apparent through two legislative committee disapprovals and non-funding of the advisory committee that nothing beneficial could result toward needed procedural reform by commingling legislative and judicial responsibilities. In the interim court dockets and congestion, lack of uniformity and efficiency had become more apparent; under these circumstances, the procedural rules were adopted.[92]

This passage attempts to bring the court's adoption of the Rules within the standard of *Newell,* quoted earlier, that the court will not displace procedural statutes so long as they coincide with the fair administration of justice. In effect, the court found that the entire system of civil procedure in Mississippi was unjust and inefficient, and therefore must be displaced wholesale by the new Rules. Obviously, this action goes well beyond *Newell.* First, the Response was made in the face of repeated legislative rejections of the rules; *Newell* dealt with an obsolete statute that no modern legislature had considered. Second, the statute dealt with in *Newell* mandated what in many cases would be a denial of due process; the standard of unfairness and inefficiency the court applied in

88. Response, *supra* note 30, at 3.
89. *See id.*
90. *See id.* at 4-5.
91. *See id.* at 5-6.
92. *See id.* at 7.

its order of May 26 to displace virtually every procedural statute in the state must have been far looser. Most important, the method by which the court acted was far different. In *Newell,* the court recounted the history of the statute and canvassed a number of cases in which it had caused injustice. In contrast, the court in the Response vaguely remarked that "[t]he need for revision of the present procedural rules for our courts and their codification has long been recognized by numerous lawyers and judges of the state."[93]

It does not go too far to say that *Newell* and the order of May 26 represent two paradigms of the judicial rulemaking process, the adjudicative and the legislative. The primary failing of the Response is its failure to offer any new rationale for this shift to the legislative paradigm. We are thrown back to the arguments in *Newell* for any explanation of the court's power.

C. *A Reconstruction*

The court, perhaps for good political reasons, left its reasoning in support of the inherent rulemaking power vague. Yet, in order to analyze the rulemaking power, it is necessary to have an argument to which to respond. There is an argument that can be distilled from the *Newell* opinion and from the Response if we take several cryptic references and ambiguous phrases in the light most favorable to the court.

1. The Nature of the Rules

First, we must identify the Rules' legal nature and specify the rulemaking process. The Rules are, first of all, a code of general applicability intended to have prospective effect. They purport to be limited in scope to matters of procedure as opposed to substance; that is, they govern the means by which rights are enforced rather than the nature of the right itself.[94] They are further limited in being concerned with trial court procedure rather than the procedure of the supreme court or of appeals to that court. The trial courts to which they apply, however, include the county courts as well as the circuit and chancery courts,[95] even though the constitution leaves the creation of county courts to the discretion of the legislature.[96]

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93. *See id.* at 3.

94. *See* Ely, *The Irrepressible Myth of Erie,* 87 HARV. L. REV. 693, 724-25 (1974).

95. MISS. R. CIV. P. 1. *See also* Newell v. State, 308 So. 2d 71, 74 (Miss. 1975).

96. MISS. CONST. art. VI, § 172. Pursuant to this authority the legislature has provided for the creation of county courts. MISS CODE ANN. § 9-9-1. *See infra* note 218.

The Rules have a peculiar constitutional status. They are not constitutional rules in the same sense as are the rules of criminal procedure that the United States Supreme Court has developed in its interpretation of the Bill of Rights.[97] The latter rules are necessarily implied by the Court's interpretation of the relevant provisions of the Constitution of the United States. But the Rules of Civil Procedure are not so implied by the court's interpretation of the separation of powers provisions of the state constitution. The precise terms of the Rules are within the court's "legislative" discretion. The court conceives the delegation of judicial power to give it plenary power over procedure in much the same way that the delegation of legislative power to the legislature gives that body plenary power over substance. By this interpretation, the Rules thus supersede procedural statutes[98] not because they are constitutional norms, but because they are within the court's defined legislative jurisdiction. The relationship of the Rules to procedural statutes is similar to the relationship of substantive statutes to the common law: rules are supreme in the area of procedure; statutes are supreme in the area of substance.

The process of enactment of the Rules is even more difficult to state, since we do not know at this point how the court intends to proceed in the future. For the initial adoption of the Rules, the court followed the administrative process prescribed in the 1975 Rulemaking Act, roughly analogous to notice and comment rulemaking;[99] and it has justified its action in adopting the rules in part by having followed that process. In the most recent deletions from the Rules, however, the court acted wholly without notice or explanation.[100] It seems clear, then, that the process of adoption of the Rules plays no part in their validity.[101] They are valid, if at all, simply because the supreme court adopts them, regardless of how the court does so. Although the court may solicit recommendations from the bar concerning the Rules, it need not do so for the Rules to be valid; furthermore, no explanation for any change in the Rules need be given.

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97. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (accused must be warned of, *inter alia*, his right to counsel during custodial interrogation).

98. MISS. R. CIV. P. 81 (h). The advisory committee note claims that this rule is "not a repealer." But, while the statutes remain effective in some courts and proceedings, it is clear that the rules effect a pro tanto repeal.

99. The most familiar expression of this technique is the Federal Administrative Procedure Act § 6, 5 U.S.C. § 553 (1976).

100. Order of March 8, 1982, *supra* note 30.

101. In this the Mississippi court follows the New Jersey view. American Trial Lawyers Association v. New Jersey Supreme Court, 126 N.J. Super. 577, 589, 316 A.2d 19, 25-26 (1974).

2. The Legal Basis for the Rules

The core of the court's reasoning in support of its asserted authority is the separation of powers provisions of the state constitution of 1890. These provisions divide the state government, conventionally, into three separate departments to exercise the legislative, judicial, and executive powers respectively.[102] The judicial power is vested "in a Supreme Court and such other courts as are provided for in this constitution."[103] The court has concluded that the "judicial power," as that term is used in the Constitution of 1890, includes the power to prescribe procedural rules. Furthermore it has concluded that, as the *supreme* court, it may prescribe rules for lower courts, regardless of whether the state constitution mandates their creation.[104]

Unlike other constitutional provisions, the phrase "judicial power" is not self-defining; it seems to require an examination of a number of sources to determine its scope.[105] And the court does, implicitly or explicitly, rely on three such sources. First is historical usage: the understanding of the framers of the 1890 constitution as to the meaning of the judicial power. Second is what may be called institutional competence: the relative merits of courts and legislatures as rulemaking bodies. Third is judicial independence: the need to preserve the integrity of the courts. The remainder of this article will consider whether these three bases support the court's action.

IV. The History of Judicial Rulemaking

The court made no attempt in *Newell* to establish that the framers of the 1890 constitution understood the phrase "judicial power" to include the final authority to make procedural rules. Indeed, it made no direct appeal to history. Nonetheless, by interpreting a constitutional provision, it implicitly decided the issue of legislative intent; and a primary, though by no means exclusive,

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102. Miss. Const. art. I, §§ 1 and 2.

103. Miss. Const. art. VI, § 144. Furthermore, no department may exercise the powers of another department, Miss. Const. art. I, §2.

104. *See infra* note 218.

105. *Cf.* J. Ely, Democracy and Distrust 13 (1980):

> Constitutional provisions exist on a spectrum ranging from the relatively specific to the extremely open-textured. At one extreme—for example the requirement that the President "have attained to the Age of thirty-five years"—the language is so clear that a conscious reference to purpose seems unnecessary . . . . Others, such as the First Amendment's prohibition of congressional laws "abridging the freedom of speech," seem to need more. For one thing, a phrase as terse as the others I have mentioned is here expected to govern a broader and more important range of problems. For another, . . . we somehow sense that a line of growth was intended, that the language was not intended to be restricted to its 1791 meaning.

source of determining that intent is the usage of the term in question at the time the constitution was drafted and ratified.[106] Furthermore, it seemed to rely on an article that did attempt to make a case for an historical rulemaking power.[107]

A. *The Historical Argument*

The argument has its roots in an address by Roscoe Pound to the American Bar Association, published in 1926.[108] There Pound argued that English Courts exercised a rulemaking power from the earliest common law, and that at the time of adoption of the American constitutions the power to make procedural rules was in the royal courts.[109] Pound further pointed out that in its first order the United States Supreme Court adopted the practice of the Courts of King's Bench.[110] From this he concludes that "if anything was received from England as part of our institutions, it was that the making of these general rules of practice was a judicial function."[111]

Pound recognized that procedural reform in the United States was carried out by the legislature.[112] The Field Code, adopted in New York in 1848, was the pattern for numerous codes and Practice Acts throughout the country.[113] This, however, he viewed as an aberration, based upon the then-prevailing view of the legislature as omnicompetent.[114] The Codes were, he said, part of a larger movement toward codification.[115] Courts allowed the control over procedure to pass to the legislatures because of their own overconservatism. Pound argued on this basis that we should return to the previous arrangement—complete judicial control—if not by constitutional interpretation then by legislative

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106. *Id.* at 12-13. *See also* C. ANTINEAU, THE ORIGINAL UNDERSTANDING OF THE FOURTEENTH AMENDMENT V. (1981); Franck & Murro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131 (1950); Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law,* 19 AM. J. LEGAL HIST. 265 (1975).

107. Franck, *supra* note 3. The Court also cited one of its own cases, which had cited with approval some of the early articles setting forth the historical argument. *See* Southern Pac. Lumber Co. v. Reynolds, 206 So. 2d 334, 335-36 n.3 (Miss. 1968) (citing Pound, *The Rule-Making Power of the Courts,* 12 A.B.A. J. 599 (1926)).

108. Pound, *supra* note 1. It is surprising that such a vast literature has developed in response to this piece which is not, strictly speaking, a scholarly article. It is five pages long and is supported by no citation of authority.

109. *Id.* at 601.

110. *Id.*

111. *Id.*

112. *Id.* at 599. *But see* Nelson, *The Reform of Common Law Pleading in Massachusetts, 1760-1830: Adjudication as a Prelude to Legislation,* 122 U. PA. L. REV. 97 (1973).

113. *Id.* at 600. *See infra* note 130.

114. *Id.* at 599-600.

115. *Id.* at 599.

enactment.[116] Pound's narrative ends in 1926; but the thread is picked up in 1950 by the New Jersey Supreme Court, which reviewed rulemaking in the twentieth century and described a "trend throughout the country . . . to give the courts the power to regulate their own procedure and administration and then hold them responsible for results."[117]

Does this historical narrative support judicial control of procedure? To limit the question, recall that the issue we are concerned with is judicial adoption of a suprastatutory code of rules, not the formulation of a rule to deal with a concrete case, or the adoption of rules pursuant to a legislative delegation of authority. If we keep this point squarely before us, it is clear that there is no historical support for any such expansive interpretation of judicial authority.

It is true that the English courts formulated rules of procedure at common law; they also formulated most rules of substance. The forms of action by which all private law was conducted were mixtures of substance and procedure developed by the accretion of case-by-case adjudication. As Maitland said:

> —'a form of action' has implied a particular original process, a particular mesne process, a particular final process, a particular mode of pleading, of trial, of judgment. But further to a very considerable degree the substantive law administered in a given form of action has grown up independently of the law administered in other forms. Each procedural pigeon-hole contains its own rules of substantive law, and, it is with great caution that we may argue from what is found in one to what will probably be found in another; each has its own precedents.[118]

The Royal Courts also promulgated codes of rules; but with few exceptions, these merely declared the customary practice.[119]

To say that English Courts developed rules of procedure does not, however, imply that those rules could displace statutes. The same reasoning would lead us to conclude that the legislature could not alter rules of substantive law that were developed by common law adjudication, and we know that "[w]here the common law and a statute differ, the common law gives place to the statute."[120] Legislative authority was used relatively sparingly, but

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116. *Id.* at 601. Pound conceded that "It may be that today, after seventy-five years of codes and practice acts and prolific procedural legislation, we can't go so far as to pronounce such legislative interference with the operations of a coordinate department to be unconstitutional."

117. Winberry v. Salisbury, 5 N.J. 240, 253, 74 A.2d 406, 413 (1950).

118. F. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 3 (1968).

119. Warner, *supra* note 4, at 441-42.

120. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 89 (1765). *See generally* J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 181-83 (2d ed. 1979).

as Pound himself recognized,[121] the English statute books contain numerous examples of procedural statutes from the earliest times.[122] To cite only one example, a statute of 1706, among other things, gave courts discretion to permit pleas to raise two or more issues, despite the common law rule against duplicity in pleading.[123]

In the United States as well, although most early rules of procedure were judge-made,[124] legislative supremacy was unquestioned.[125] For example, an early Maryland case found that statutory requirements for service of process were controlling, despite many years of judicial disregard.

> These precedents would seem to sanction the position, that a positive legislative enactment may be virtually repealed by a long, general, and uninterrupted course of practice. But they are precedents which I should feel a great repugnance to adopt and enlarge upon. I hold it to be my duty to treat the acts of my predecessors with respect; and to yield implicit obedience to my superiors; yet I cannot lose sight of the sphere assigned to the judiciary, and allow myself, by any suggestion arising from the case, or by following any lightly considered precedent, to overstep the limits constitutionally prescribed to the judicial department to which I belong. No judge or court, either of the first or last resort, can have any right to *legislate* and there can be no difference between the power to declare an act of Assembly obsolete, and the power to enact a new law. The power to repeal and to enact are of the same nature. I shall therefore always consider an express provision of a constitutional act of Assembly as an authority superior to any usage or adjudged case whatever.[126]

Nothing could make this final legislative control over procedure clearer than the course of procedural reform in the nine-

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121. "[T]here had been legislation on procedure extending back to the law making activity of Edward I." Pound, *supra* note 1, at 599. Pound may have been referring to, for example, the Second Statute of Westminster, 1285, 13 Edw. c. 38, which regulated among other things, the qualifications of jurors. Pound also recognized that there was "regular resort to legislation as a means of governing procedure in the courts . . . in England after 1688." *Id.*

122. Warner, *supra* note 4, at 442.

123. 4 & 5 Anne c. 16 (1706). *See* 3 BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 308 (1768). The same statute also prohibited the making of dilatory pleas without proof of their truthfulness, and required the specification of grounds for a demurrer. *Id.* at 302, 315. Among other important procedural statutes were 2 Geo. 2, ch. 22 (1716) and 8 Geo. 2, ch. 24 (1722) permitting setoffs of mutual debts, and 3 Geo. 2, ch. 25 (1715) giving both parties the right to move for a special jury.

124. *See* Nelson, *supra* note 112.

125. Pound is somewhat grudging on this point. He argues that in England, after 1688, Parliament was dominant, but in this country we returned to the Tudor and Stuart model by putting "checks on the legislative as well as upon the executive." Pound, *supra* note 1, at 599. He nevertheless conceded, somewhat vaguely, that "ideas of legislative supremacy and uncontrolled law making power were in the air and in the books when our institutions were formative," and that "there was a palpable legislative hegemony in this country down to the time of the civil war . . . ." *Id.* He claims that after the Civil War, with enhanced judicial review of the legislation, legislative preeminence somehow declined. This, however, is a nonsequitur on the issue of legislative jurisdiction over procedure.

126. Snowden v. Snowden, 1 Bland 550, 556 (Md. 1829), *quoted in* G. CALABRESI, *supra* note 74, at 187 n. 18.

teenth century, during which the cumbersome, archaic, and obscure system of procedure under the writ system was swept away by a succession of statutes. In one isolated but spectacular example in England, the Court of King's Bench, in 1818, found itself incapable of abolishing trial by battle when it had been demanded by a defendant;[127] only an act of Parliament could accomplish it.[128] In this country, an even more direct legislative approach was taken. Although in England, Parliament, in the great reform statutes of 1852 and 1872, left the court with significant authority to modify procedural rules;[129] in the states, the codes established elaborate systems of pleading that were binding on the courts.[130]

This legislative action was not, as Pound argued, the result of judicial overconservatism or a peculiarly inflated sense of legislative competence in the nineteenth century. First of all, procedural reform by statute was not an innovation of the nineteenth century;[131] only its scale was new. And that scale made it all the more appropriate for statutory treatment. As Friedrich Hayek has observed, legislation is necessary to correct bad law that has grown by case-by-case adjudication, since "the development of case-law is, in some respects, a one-way street":

> [I]t is not only difficult but also undesirable for judicial decisions to reverse a development, which has already taken place and is then seen to have undesirable consequences or to be down-right wrong. The judge is not performing his func-

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127. Ashford v. Thornton, 1 B. & Ald. 405 (1818).

128. 59. Geo. 3, ch. 46 (1819).

129. J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 24-26 (1977).

130. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 340-47 (1973). The Field Code, Laws N.Y., C. 379 (1848) was widely imitated, especially in the West. *Id.* at 343.

131. An amusing example is given in 3 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 322 (1768). After a long and entertaining history of the language of pleading, he writes:

> Latin continued in use from the time of its first introduction, till the subversion of our ancient constitution under Cromwell; when among many other innovations in the law, some for the better and some for the worse, the language of our records was altered and turned into English. But, at the restoration of King Charles, this novelty was no longer countenanced; the practisers finding it very difficult to express themselves so concisely or significantly in any other language but the Latin. And thus it continued without any sensible inconvenience till about the year 1730, when it was again thought proper that the proceedings at law should be done into English, and it was accordingly so ordered by statute 4 Geo. II. c. 26. This was done, in order that the common people might have knowledge and understanding of what was alleged or done for and against them in the process and pleadings, the judgment and entries in a cause. Which purpose I know not how well it has answered; but am apt to suspect that the people are now, after many years experience, altogether as ignorant in matters of law as before. On the other hand, these inconveniences have already arisen from the alteration. . . . The translation also of technical phrases, and the names of writs and other process were found to be so very ridiculous (a writ of nisi prius, quare impedit, fieri facias, habeas corpus, and the rest, not being capable of an English dress with any degree of seriousness) that in two years time a new act was obliged to be made, 6 Geo. II. c. 14; which allows all technical words to continue in the usual language, and has thereby almost defeated every beneficial purpose of the former statute.

> tion if he disappoints reasonable expectations created by earlier decisions. Although the judge can develop the law by deciding issues which are genuinely doubtful, he cannot really alter it, or can do so at most only very gradually where a rule has become firmly established; although he may clearly recognize that another rule would be better, or more just, it would evidently be unjust to apply it to transactions which had taken place when a different rule was regarded as valid. In such situations it is desirable that the new rule should become known before it is enforced; and this can be effected only by promulgating a new rule which is to be applied only in the future. Where a real change in the law is required, the new law can properly fulfil the proper function of all law, namely that of guiding expectations, only if it becomes known before it is applied.[132]

Thus, reform of common law pleading by adjudication could only be accomplished gradually.[133] The only way the courts could satisfy the requirement of prospectivity would be to act legislatively, by adoption of a code of rules that superceded prior decisional and statutory law. Such an action would have been entirely without precedent in English and American legal history.

B. *The Influence of the Federal Rulemaking Process*

It is true, as Pound says, that the Codes were partly expressions of a larger movement away from common law toward written or statutory law.[134] It is also true that this trend has raised problems of its own. Whatever else may be said for the writ system, it had the virtue of susceptibility to growth and change; statutory enactments, however, can remain fixed long after their need has passed away.[135] Our elaborate system of checks and balances make statutory revision difficult once the fervor for reform has passed.[136] This problem is particularly acute in the area of procedure, where it is difficult to attract the attention of legislatures.[137]

One of the devices used to deal with statutory obsolescence is the delegation of legislative power.[138] The device is as old as

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132. 1 F. HAYEK, LAW, LEGISLATION, AND LIBERTY 88-89 (1973).

133. Nelson, *supra* note 112.

134. Pound, *supra* note 1, at 599. L. FRIEDMAN, *supra* note 130, at 351-58. The Field Code of Procedure of 1848 was drafted and adopted pursuant to the direction of N.Y. CONST. art. I., § 24 (1846). N.Y. CONST. art. I, § 17 (1846) directed the legislature to appoint a commission "whose duty it shall be to reduce into a systematic code the whole body of the law of this state, or so much and such parts thereof as to the said commissioners shall seem practical and expedient." The leading member of the commissions, which finally reported a Political Code in 1860, and Civil and Penal Codes in 1865, was David Dudley Field. *See* READINGS IN AMERICAN LEGAL HISTORY 492-93 n. 1 (M. Howe 2d ed. 1971). For an excellent contemporary summary of the arguments for codification, see R. Rantoul, Oration at Scituate, Massachusetts, July 4, 1836, *Id.* at 472.

135. The most eloquent statement of the problem of "Statutorification" is G. CALABRESI, *supra* note 74. Pound himself was distinctly of his view. *See* Kay, *supra* note 1, at 37.

136. G. CALABRESI, *supra* note 74, at 6.

137. Newell v. State, 308 So. 2d 71, 76 (Miss. 1975).

138. G. CALABRESI, *supra* note 74, at 44-68.

the Republic,[139] but its use reached flood stage in the New Deal.[140] Under this device, an expert administrative body is created under an extremely broad statutory mandate to deal with a social problem by the adoption of rules. In theory the administrative agency, by continual association with the problem, can keep the applicable law current.

The Federal Rules Enabling Act of 1934 was very much a part of this trend.[141] The Congress, recognizing their lack of familiarity with the problem but also recognizing the need for uniformity of procedure in federal court, delegated to the Supreme Court the authority to promulgate procedural rules subject to Congressional veto.[142] The Court, at first, seemed to take its authority lightly, doing nothing for almost a year.[143] Finally, at the instance of a former attorney general of the United States, the Court appointed a committee of experts, which recommended a draft of the federal rules.[144] The Court adopted the rules virtually without revision and transmitted them to Congress. The Rules became effective in 1938.[145] The entire rulemaking structure, of course, presupposed Congressional superiority, and the Court itself has recognized this.[146]

For a time this structure of rulemaking worked well, and the rules were widely and effusively praised.[147] On four occasions

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139. *See, e.g.*, The Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382 (1813). The same technique was applied in the area of judicial procedure. The Process Act of 1792 included a delegation of rulemaking authority to the Supreme Court. *See*, J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, 546-47 (1971).

140. *See, e.g.*, Bernstein, *Regulating Business by Independent Commission*, in PERSPECTIVES ON THE ADMINISTRATIVE PROCESS 105 (R. Rabin ed. 1979); Wilson, *The Rise of the Bureaucratic State*, in PERSPECTIVES ON THE ADMINISTRATIVE PROCESS 16 (R. Rabin ed. 1979); Friendly, *A Look at the Federal Administrative Agencies*, 60 COLUM. L. REV. 429 (1960); Stern, *The Commerce Clause and the National Economy*, 1933-46, 59 HARV. L. REV. 645 (1946).

141. Act of June 19, 1934, ch. 651, 48 Stat. 1064. (Codified in 28 U.S.C. § 2072 (1976)). *See* Clark & Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 387 (1935); Sunderland, *The Grant of Rule-Making Power to the Supreme Court of the United States*, 32 MICH. L. REV. 1116 (1934).

142. 28 U.S.C. § 2072 (1976).

143. This laxity was consistent with its performance under earlier delegations of rulemakng authority. *See* Warner, *supra* note 4, at 442.

144. *See*, C. WRIGHT, THE LAW OF FEDERAL COURTS 292 (3d ed. 1976). The former attorney general, William D. Mitchell, based his argument on a recent article which had argued for a full revision of federal practice, including a merger of law and equity. *See* Clark & Moore, *supra*, note 141. Mitchell was designated chairman of the advisory committee, and Charles Clark, a co-author of the article, was designated as reporter. C. WRIGHT, *supra*, at 292.

145. C. WRIGHT, *supra* note 140, at 292.

146. *See, e.g.*, Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941): "Congress has undoubted power to regulate the practice and procedure of the federal courts . . . ."

147. One writer called them "one of the greatest contributions to the free and unhampered administration of law and justice ever struck off by any group of men since the dawn of civilized law." Carey, *In Favor of Uniformity*, 18 TEMP. L. Q. 146, 146 (1943). *See also*, commentary collected at 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1007, n.40. (1969).

after 1938, the advisory committee recommended changes which were incorporated into the rules.[148] In 1955, however, the Committee proposed amendments which were never acted on by the Court; and with the Court's abolition of its advisory committee in 1956, the process of obsolescence began again.[149]

As the need for revisions of the rules became more acute and the Court failed to respond, Congress passed new legislation ordering the Judicial Conference of the United States to "carry on a continuous study" of federal practice and to recommend needed changes to the Supreme Court "for its consideration and adoption, modification or rejection, in accordance with law."[150] In 1960, the Conference created a Standing Committee on Rules of Practice and Procedure and five Advisory Committees, including one on the Civil Rules. Under current procedure, the Advisory Committee prepares drafts of rules, circulates them for comment, and then submits the drafts to the Standing Committee. The Standing Committee considers the rule, then reports it to the Judicial Conference which in turn makes its recommendation to the Supreme Court. The Court may amend or accept the Rules in full and transmit them to Congress under the Enabling Act,[151] or it may reject them.

The federal model of rulemaking has been extremely influential. In all but five states,[152] court systems, though not necessarily supreme courts, have primary responsibility for rulemaking. In a significant number of these, the courts' authority is based solely on statutes roughly comparable to the Federal Rules Enabling Act.[153] An even larger number have gone so far as to exalt

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148. *See,* 308 U.S. 642 (1939); 329 U.S. 839 (1947); 335 U.S. 919 (1948); 341 U.S. 959 (1951). *See also,* J WEINSTEIN, *supra* note 127, at 68; Wright, *Amendments to the Fedral Rules: The Function of a Continuing Committee,* 7 VAND. L. REV. 521 (1954).

149. *See,* J. WEINSTEIN, *supra* note 127, at 68; Wright, *Rule 56(e): A Case Study on the Need for Amending the Federal Rules,* 69 HARV. L. REV. 839 (1956).

150. 28 U.S.C. § 331 (1976).

151. J. WEINSTEIN, *supra* note 129, at 69.

152. In these states, civil procedure is primarily governed by comprehensive legislative codes. CAL. CIV. PROC. CODE §§ 1-2103 (West 1982); LA. CODE CIV. PROC. arts. 1-5251 (West 1961); N.Y. CIV. PRAC. LAW §§ 101-10005 (McKinney 1981); OKLA. STAT. tit. 12, §§ 1-3215 (1960); ORE. REV. STAT. tit. 1, ch. 1 § 1.001-tit. 6, ch. 55 § 55.140 (1981). The judiciary, even here, however, has some subsidiary rulemaking authority.

153. GA. CODE § 15-1-5 (1981); KAN. STAT. ANN. § 60-2607 (1976); ME. REV. STAT. ANN. tit. 4, § 451 (Supp. 1981) (establishing judicial council); MASS. GEN. LAWS ANN. ch. 211, § 3 (1955); MINN. STAT. §§ 480.51, 480.058 (1971); N.H. REV. STAT. ANN. § 490.4 (1968); R.I. GEN. LAWS § 8-6-2 (Supp. 1982); UTAH CODE ANN. §§ 78-2-4, 78-7-6 (1953); WIS. STAT. ANN. § 251.18 (West 1971); WYO. STAT. §§ 5-2-144 to -115 (1977).

The legislature is explicitly given constitutional authority over procedure in some of these states. GA. CONST. art. VI, § 9, para. 1; IOWA CONST. art. V, § 14.

the federal model to constitutional status by adopting judiciary articles for their state's constitutions that specifically vest rulemaking authority of one sort or another in the state court system, usually in the supreme court. In most of these states, the state supreme court's authority is subject to some kind of legislative control;[154] but in nine states, the judiciary article vests final rulemaking authority in the supreme court subject to no direct review by the legislatures.[155]

The irony of this last development is that the federal model, placing the promulgating authority in the Supreme Court, has come under increasing criticism in recent years for reasons which I will state in later sections.[156] The point here is that states that have frozen the federal model into their constitutions cannot alter their course now without overcoming the hurdle of constitutional revision. It is a lesson in constitutional reform that transitorily successful legislative models should not be frozen into the constitutional structure.

Even more dubious, however, is to constitutionalize judicial control of rulemaking by interpretation of the separation-of-powers provisions of the state constitution. Nine state courts currently assert an inherent, suprastatutory rulemaking authority on this

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154. In some states the constitution makes court rules subject to state-wide legislation. ALA. CONST. amend. 328, § 6.11; LA. CONST. art. V, § 5(A); MD. CONST. art. IV, § 18(A); MO. CONST. art. V, § 5; MONT. CONST. art. VII, § 2; NEB. CONST. art. V, § 25; S. C. CONST. art. V, § 4; S.D. CONST. art. V, § 12; TEX. CONST. art. V. § 25; VA. CONST. art. VI, § 5.

In others, the constitution provides that court rules may be disapproved by some specified proportion of the state legislature. ALASKA CONST. art. IV, § 15 (two-thirds); FLA. CONST. art. V, § 2 (two-thirds); OHIO CONST. art. IV, § 5 (B) (simple majority); VT. CONST. ch. II, § 37 (simple majority).

155. ARIZ. CONST. art. VI, § 5(5); State *ex rel.* Purcell v. Superior Court, 107 Ariz. 224, 227, 485 P.2d 549, 552 (1971); COLO. CONST. art. VI, § 21; DEL. CONST. art IV, 313; HAW. CONST. art. V, § 6; Kudlick v. Ciciarelli, 48 Hawaii 290, 300, 401 P. 2d 449, 455 (1965); KY. CONST. § 116; MICH. CONST. art. VI, § 5; Buscaino v. Rhodes, 385 Mich. 474, 478, 189 N.W.2d 202, 204 (1971); N.J. CONST. art. VI, § 2, Par. 3; Winberry v. Salisbury, 5 N.J. 240, 245, 74 A.2d 406, 409 (1950), *cert. denied* 340 U.S. 877 (1950); *but see* Kaplan and Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234 (1951); N.D. CONST. art. IV, § 3; Matter of Bieber, 256 N.W.2d 879, 882 n.1 (N.D. 1977); PA. CONST. art. 5, § 10.

156. *See* text accompanying notes 196 through 201 *infra.*

basis,[157] although in each case, except Mississippi, the "inherent" authority is confirmed by some form of statutory delegation.[158] To the extent this claim of authority is based on history, we can see it is plainly wrong. History teaches that the courts have had control over procedure, but that this control was always subject to final legislative authority. What these courts claim is not any dormant historical power, but a transference of the traditional legislative authority over procedure that other courts have obtained, if at all, by a specific legislative or constitutional delegation.

C. *The Special Case of Mississippi*

The historical argument is most doubtful in Mississippi, where the present state constitution was adopted in 1890—the heyday of legislative control. In a sense, it does not matter what the status of rulemaking power was "at the time of the adoption of the American constitutions"[159] if by that phrase we mean the turn of the eighteenth and nineteenth centuries. It is beyond question that the framers of the Mississippi Constitution in 1890 understood that the legislature had the power to enact procedural statutes.[160] Throughout the latter part of the nineteenth century, procedure in Mississippi was governed, as in most other states, by statute.[161] The compilations of the statutory law of the state in force immediately before and after the 1890 Constitution contain elaborate

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157. Ward School Bus Mfg., Inc. v. Fowler, 261 Ark. 100, 547 S.W.2d 394 (1977); State v. Clement, 166 Conn. 501, 353 A.2d 723 (1974); R.E.W. Construction Co. v. District Court, 88 Idaho 426, 400 P.2d 390 (1965) and State v. McCoy, 94 Idaho 236, 486 P.2d 247 (1971); People v. Jackson, 69 Ill. 2d 252, 371 N.E.2d 602 (1977); State v. Buildenhager, 257 Ind. 699, 279 N.E.2d 794 (1972), Newell v. State, 308 So. 2d 71 (Miss. 1975) and order of May 26, 1981, *supra* note 8. Goldberg v. Eighth Judicial District Court, 572 P.2d 521 (Nev. 1977); State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936) and Southwest Underwriters v. Montoya, 80 N.M. 107, 452 P.2d 176 (1969); State v. Fields, 85 Wash. 2d 126, 530 P.2d 284 (1975) and Petrarca v. Halligan, 83 Wash. 2d 773, 522 P.2d 827 (1974) and State v. Smith, 84 Wash.2d 498, 527 P.2d 674 (1974).

Other states have asserted inherent authority, and were later given express constitutional authority. Burton v. Mayer, 274 Ky. 263, 118 S.W.2d 547 (1938); Kolkman v. People, 85 Colo. 8, 300 P. 575 (1931).

158. ARK. STAT. ANN. §§ 22-242, -245, -246 (Supp. 1981); IDAHO CODE §§ 1-212 to 213 (1948); IND. CODE ANN. § 34-5-2-1 (Burns 1971); NEV. REV. STAT. § 2.120(2) (1981); N.M. STAT. ANN. § 38-1-1 (1978); WASH. REV. CODE ANN. §§ 2.04.190 to .200 (1961).

159. Franck, *supra* note 3, at 290.

160. The separation of powers provisions of the 1890 Constitution were also present in earlier Mississippi constitutions. *See* MISS. CONST. art. II, §§ 1, 2 (1817); MISS. CONST. art. II § 1 (1832); MISS. CONST. art. III, § 1 (1869). But reenactment of the constitution in 1890 without a reallocation of responsibilities for procedural rulemaking indicated implicit acceptance of the existing distribution of powers.

161. *See supra* notes 23-26.

codes of procedure for both chancery and circuit courts.[162] To the extent historical usage is relevant in interpreting a constitutional provision, it is the usage at the time of enactment that is controlling.[163]

V. INSTITUTIONAL COMPETENCE

The court did not rest its action solely on an historical argument; it also based its interpretation of the Judicial Power Clause on a functional argument. First, the court reasoned that the supreme court is a better agency than the legislature to develop rules because of its day-to-day familiarity with the judicial process.[164] Second, the court reasoned that control of rulemaking is essential for the preservation of judicial independence—a crucial element of the constitutional separation of powers.[165]

These points are at least relevant as a matter of constitutional interpretation. Some clauses cannot be given meaning solely on the basis of historical understanding; some broader inquiry is required.[166] In the case of the Judicial Power Clause, perhaps more than other clauses, a full interpretation requires an analysis of the role of the judiciary within the entire constitutional scheme. The separation of the judicial from the executive and legislative power is one of the "auxiliary precautions" adopted in American constitutions that "enable the government to control itself."[167] To understand whether procedural rulemaking is properly confined to the judicial branch, we must make a functional analysis of the constitutional responsibilities of the three branches.

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162. MISS. CODE, ch. 20, §§ 440-608 (Chancery Court), ch. 21, §§ 609-766 (Circuit Court), (1892); MISS. CODE, ch. 58, §§ 1469-1789 (Circuit Court), ch. 59, §§ 1790-2128 (Chancery Court) (1880).

163. Compare, for example, the right to trial by jury "in suits at common law," as "preserved" by the seventh amendment of the United States Constitution. An important question in interpreting the scope of that right is the allocation of issues between courts of law and equity as of 1791, when the constitution was adopted. *See* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil § 2302 (1971). Naturally, this test is not conclusive. Changes in procedure and the merger of law and equity by the Federal Rules of Civil Procedure require some adjustments. *See, e.g.*, Beacon Theaters, Inc. v. Westover, 359 U.S. 500 (1959). But it is certainly irrelevant what the allocation of jurisdiction between courts of law and equity was in 1691 or 1591, if it differed from the situation in 1791. By the same logic, it is the allocation of rulemaking authority between the court and legislature in 1890 that is most pertinent in interpreting the judicial power of the court.

164. Newell v. State, 308 So. 2d 71, 76 (Miss. 1975).

165. *Id.* at 77.

166. C. BLACK, DECISION ACCORDING TO LAW 23-26 (1981); J. ELY, *supra* note 105, at 11-41.

167. F. WORMUTH, THE ORIGINS OF MODERN CONSTITUTIONALISM 3 (1949) (quoting HAMILTON, THE FEDERALIST).

The first of the court's functional arguments is that courts are particularly well equipped by learning and experience to develop rules of procedure and that they should, therefore, have rulemaking supremacy. On one level, the court may be saying in substance what one often-quoted article claimed:

> When we place the rule-making power in the hands of the legislature we are putting the administration of justice at the mercy of inferior lawyers. It is the unusual lawyer who goes to the state legislature except at the beginning of his career, in which case he is without experience, or at the end of it, in which case it is a confession of futility.[168]

More likely, however, the court's point is that its day-to-day activities keep them aware of the need for procedural changes and how best to make them. Legislators, concerned as they are with the rest of substantive legislation, cannot maintain the necessary awareness of the needs of the procedural system.

At the outset, one should note that there is a problem for the court in taking this position in support of the Rules. It may be that at the time *Newell* was decided the legislature had simply neglected the issue of procedural reform because it was "overburdened"[169] with other questions. But "[i]n recent years . . . the legislature has passed from an attitude of neglect to a stance of positive obstruction"[170] of judicial reform. There is a fundamental difference here. If the legislature has simply not considered the issue of reform, or if, as in *Newell,* the statute has become obsolete, then there is little threat to democracy in the court's action. But if the legislature has considered the reform and rejected it, then the court finds itself standing against the explicit wishes of the citizens' elected representatives. It may be that the court knows procedure better, but the legislature clearly has decided that it knows enough to make the contrary decision. There is a distinctly undemocratic flavor to an argument that the court should give the people what they need, not what they want.

A. *Expertise and Legitimacy*

The major difficulty with the court's reasoning is that it confuses expertise with legitimacy. The mere fact, if it is a fact, that the court knows more about procedure than the legislature says

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168. TYLER, *The Origin of the Rule-Making Power and Its Exercise by Legislatures,* 22 A.B.A. J. 772, 775 (1936).

169. Newell v. State, 308 So. 2d 71, 76 (Miss. 1975).

170. Brief for Mississippi State Bar, Young Lawyers Section at 11. In the Matter of the Proposed Rules of Civil Practice and Procedure, Misc. No. 896 (Apr. 21, 1981).

nothing about where the power to make rules of procedure lies. Rulemaking, although related to the court system, is lawmaking; and lawmaking is primarily a legislative function. Courts do, of course, make law.[171] But their legitimacy in doing so depends on their adherence to the judicial process and on the subordination of judge-made rules to legislation.

1. Legislative versus Judicial Processes

Legislatures are the institutions typically relied upon in constitutional government for formulating prospective laws of general applicability.[172] They derive their legitimacy from the principle of representation, that is, their ability to reflect "the demands of the shifting minorities that make up a majority of the governed."[173] They need not have any particular knowledge of a subject in order to legislate over it; statutes may be based upon any facts the legislature chooses to consider.[174] Legislation must not, however, intrude on the judicial function of deciding individual cases.[175]

Courts, on the other hand, derive their legitimacy as lawmakers from the process of reasoned decision-making in adjudication.[176] Although state-court judges are often elected,[177] they are not chosen to represent the wishes of the majority, as legislators are, but for their ability to carry out the judicial business of deciding cases.[178] The central element in this notion of legitimacy is the adversary process. Courts rely almost exclusively on the parties to a concrete dispute to present the evidence and arguments necessary to make the decision;[179] the rule that emerges from this

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171. Erie R.R. v. Tompkins, 304 U.S. 64 (1938). J. ELY, *supra* note 105, at 4; G. WHITE, THE AMERICAN JUDICIAL TRADITION 149 (1976).

172. 1 F. HAYEK, *supra* note, 130, at 128-34.

173. G. CALABRESI, *supra* note, 74 at 51

174. *See, e.g.*, Maryland v. Wirtz, 392 U.S. 183, 190 n. 13 (1968); Townsend v. Yeomans 301 U.S. 441, 451 (1937).

175. *See* U.S. CONST. art. I, §§ 9-10 (Bill of Attainder); MISS. CONST. art. IV, §§ 87-90; J. HURST, LAW AND SOCIAL ORDER IN THE UNITED STATES 85-90 (1977) (local and special laws).

176. G. Calabresi, *supra* note 74, at 96; Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); Thibaut & Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541 (1978).

177. Adamany & Dubois, *Electing State Court Judges*, 1976 WIS. L. REV. 731. It is interesting that, at the time of the 1890 Constitutional Convention, Mississippi's Supreme Court Justices were appointed by the governor. L. FRIEDMAN, *supra* note 130, at 333.

178. G. CALABRESI, *supra* note 74, at 93-97.

179. *See* Medina, *Some Reflections on the Judicial Function: A Personal Viewpoint*, 38 A.B.A. J. 107, 107-108 (1952). The principal exceptions to this are the use of amicus briefs, *see* Comment, *The Amicus Curiae*, 55 NW. U.L. REV. 469 (1981), and judicial notice, *see* MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 757-82, (2d ed. 1972).

process must normally be applied to the case before the court[180] and be justified by a reasoned opinion.[181] Any change that the rule makes in the prior law must be relatively small.[182] All of this is what is meant by the "judicial function." [183]

In this process, judges do not directly do the will of the majority that elected them.[184] Nonetheless, their lawmaking is legitimate in a democracy because they are bound to decide cases "according to law," that is, to integrate their result with the continually-developing body of precedent.[185] The courts are institutionally best suited to interpret the needs of the legal fabric and discover the principles of law necessary to decide concrete cases.[186]

Once courts are cut free of the case or controversy element of their law making function, as they are when they issue advisory opinions[187] or when they make rules of procedure, they no longer have this legitimacy. The number of factors they must consider in developing a rule in the abstract multiplies. They lack the benefits of the adversary process in gathering facts, in developing arguments, and in refining issues. And, most significant, the importance of their personal preference on issues of policy becomes critical. In short, they begin to function as a political body.[188]

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180. *See, e.g.*, Simpson v. Union Oil Co., 396 U.S. 13, 14 (1969) (per curiam); *but see* Pruett v. City of Rosedale, 421 So. 2d 1046 (Miss. 1982), Great Northern Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932), Note, *Prospectively Overruling the Common Law*, 14 SYRACUSE L. REV. 53 (1962).

181. A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 81-82 (2d ed. 1978); 1 F. HAYEK, *supra* note 132, at 94-97, 115-23.

182. *See, e.g.*, Peck, *The Role of the Courts and Legislature in the Reform of Tort Law*, 48 MINN. L. REV. 265 (1963).

183. *See* P. BATOR, P. MISHKIN, D. SHAPIRO, H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 66 (2d ed. 1973) (hereinafter HART AND WECHSLER). "[T]he judicial function is essentially the function . . . of authoritative application to particular situations of general propositions drawn from preexisting sources—including as a necessary incident the function of determining the facts of the particular situation and of resolving uncertainties about the content of the applicable general propositions." This is also the traditional view in Mississippi. *See* G. ETHRIDGE, MISSISSIPPI CONSTITUTIONS 27-28 (1928).

184. G. CALABRESI, *supra* note 74, at 100.

185. *Id.* at 100-01. *See also supra* note 135.

186. *See* C. BLACK, DECISION ACCORDING TO LAW (1981).

187. *See* J. WEINSTEIN, *supra* note 129, at 44-45.

188. *See* HART AND WECHSLER, *supra* note 183, at 67. The United States Supreme Court has recognized that state court rulemaking for the governance of the bar is a legislative rather than an adjudicative activity. Supreme Court of Va. v. Consumers Union, 446 U.S. 719, 731 (1980); Lathrop v. Donohue, 367 U.S. 820, 825 (1961). The process of procedural rulemaking is identical. Historically, governance of the bar has been thought peculiarly within the legislative authority of state supreme courts. *See* Dowling, *The Inherent Power of the Judiciary, 21 A.B.A. J. 635 (1935); Board of Comm'rs. v. State ex rel.* Baxley, 295 Ala. 100, 324 So. 2d 256 (1975). Ironically, in Mississippi, the constitution specifically gives this power to the legislature. *See* MISS. CONST. art. IV, § 90(s).

Courts do, of course, adopt rules outside the adjudicatory process under delegations of rulemaking authority. In such cases, however, the courts act as administrative agencies and as such must conform to norms of legitimacy for administrative rulemaking. The single most important of these norms is that rules must be subject to legislation. In addition, although due process does not require that any particular procedures be followed in administrative rulemaking, traditional administrative procedure requires a regular process of notice to all affected groups, and an opportunity for comment. The Mississippi Supreme Court's claimed rulemaking authority satisfies neither of these norms. The Rules are suprastatutory, as I will discuss in the next section. Furthermore, under the court's interpretation of its authority, the court need not follow any established rulemaking procedure.

The advisory committee and the court itself did hold hearings on the Rules. But since the order of May 26, the court has acted entirely sua sponte and without notice or explanation. There was confusion, for example, as to the version of the Rules that the court adopted in the order of May 26. Members of the advisory committee had agreed to several important changes in the Rules after the Rules were rejected by the House of Representatives. Yet the final version of the Rules did not include those changes.[189] Furthermore, the court's order only adopted the Rules; it did little to explain the necessity for their adoption. The advisory committee notes to the Rules are largely devoted to pointing out the changes that have been made rather than to justifying them. Likewise, the Response speaks only in general terms of the need for reform, and never explains the myriad individual rules or the grounds for superseding statutes. The court's action in deleting two of the rules when it resubmitted the Rules to the legislature in March 1982 was even more questionable.[190] In this instance, it acted without the recommendation of its advisory committee and entirely in secret—a process for which other courts

189. *See supra* note 39.
190. *See supra* note 56.

have been bitterly and justifiably criticized.[191] The court's perfunctory manner in this action gives the appearance of action by fiat.

Thus, the separation-of-powers provisions of the state constitution do not allocate any subject matter exclusively to one branch of government or another for purposes of lawmaking. Instead, they define the processes by which lawmaking is to take place: the legislature is to act by legislative process, relying principally on majoritarianism for legitimacy; the court, in the absence of a delegation of rulemaking authority, is to act by the judicial process, relying on reasoned explanation in adjudication for legitimacy. Regardless of the court's expertise in the area of procedure, they have no authority through the judicial power to enact a generally-applicable code of rules entirely divorced from a particular controversy.

2. Legislative Supremacy in Lawmaking

The court's action is also objectionable on grounds independent of the process by which it was done. By adopting the Rules, the court has placed itself beyond review by the legislature. Judicial lawmaking in a democracy has traditionally been justified by the idea of a "hierarchy of norms" under which the actions of any government agency can be measured against some legal standard.[192] Judges may make law in part because their law is subordinate to that of the legislature.[193] Of course, "whenever the power of final decision is lodged, there also is the power of abuse."[194] But, the harm of legislative abuse is less than that of judicial abuse because legislatures are more directly accountable to the electorate. What Justice Jackson said thirty years ago concerning implied presidential powers applies here as well:

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191. *E.g.*, J. WEINSTEIN, *supra* note 129, at 101. (Supreme Court's unexplained modification of informer privilege in Federal Rules of Evidence); *The Supreme Disgrace: An Editorial Investigation of Pennsylvania's Supreme Court*, PHILADELPHIA INQUIRER, March, 1978, quoted in C. GRAU, *supra* note 4, at 50:

> The court is now a quasi-legislative body as well as a judicial one. Nevertheless, in virtually every task it undertakes, it operates in secrecy. Take, for example, the court's power to promulgate rules of criminal procedure. It is done behind closed doors, without any public participation, without any prior public notice of proposed changes, nor any requirement to obtain comments from interested parties . . . . The failure to provide prior notice of proposed rules deprives the public and officials adequate opportunity to inform the court of the practical consequences of a proposed change. Moreover, the court, without prior notice or debate, can and does overturn laws enacted by the legislature on the premise that the lawmakers have intruded on the procedural rulemaking authority of the court.

192. M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 320 (1967).

193. 1 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 90 (1765); J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); J. ELY, DEMOCRACY AND DISTRUST 4 (1980).

194. F. WORMUTH, *supra* note 167, at 206.

> Loose and irresponsible use of adjectives colors all nonlegal and much legal discussion of presidential powers. "Inherent" powers, "implied" powers, "incidental" powers, "plenary" powers, "war" powers and "emergency" powers are used, often interchangeably and without fixed or ascertainable meanings.
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> . . .
>
> With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.[195]

The court may seek to justify judicial supremacy in rulemaking through the principle of judicial review.[196] The courts are undeniably the interpreters of the constitution, and a rule formulated to enforce a constitutional provision—the *Miranda* rule, for example—cannot be overturned by legislation.[197] One might argue that the new Rules are necessarily implied by the separation-of-powers provisions of the state constitution and are, therefore, suprastatutory.

This reasoning, however, misrepresents the character of the Rules. They are not implied by the constitutional delegation of judicial power of the courts any more than a statute is implied by the delegation of legislative power to the legislature. The rules are, in effect, judicial legislation enacted within a defined jurisdiction. They prevail over statutes in the area of procedure, just as statutes prevail over the common law. This inversion places the court in the position of a legislature that is above review by the most direct representatives of the electorate.

It is improper to justify the order of May 26 on the basis of judicial review for another reason. In *Marbury v. Madison,* Chief Justice Marshall justified judicial review by the necessity of the court's deciding cases: "It is emphatically the province and duty of the judicial department to say what the law is. *Those who apply the rules to particular cases,* must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."[198] Legislatures cannot have final authority on the consitutionality of legislation, in Marshall's view, because such a power would intrude on the court's un-

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195. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 646-47, 655 (Jackson, J., concurring).

196. Newell v. State, 308 So. 2d 71,77 (Miss. 1975) (semble).

197. Of course, the power of judicial review raises its own problem for a democracy. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 16-28 (1962); C. BLACK, DECISION ACCORDING TO LAW (1981); J. CHOPER, *supra* note 193, at 12-45; J. ELY, *supra* note 193. L. HAND, THE BILL OF RIGHTS (1962); *Constitutional Adjudication and Democratic Theory,* 56 N.Y.U.L. REV. 259 (1981); *Symposium: Judicial Review Versus Democracy,* 42 OHIO ST. L.J. 1 (1981); Bishin, *Judicial Review in Democratic Theory,* 50 S. CALIF. L. REV. 1099, 1102-1112 (1977).

198. 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added).

disputed power to decide individual cases. Clearly, the court's wholesale invalidation of procedural statutes by the adoption of code of rules cannot be justified on the basis of the need to decide a particular case. As a distinguished Mississippi judge of an earlier generation wrote, "The judges have no power to pass on the constitutionality of an act of the legislature until some citizen has called upon it to decide a right of such citizen that has been violated by such law . . . ."[199]

B. *The Relative Expertise of Courts and Legislatures*

The supreme court thus should not be accorded supremacy over legislatures in rulemaking on the grounds of institutional competence, even if it has superior expertise in that area. But it is by no means clear that the court does have superior expertise. Legislatures do not have daily familiarity with procedure; but neither do they have any familiarity with occupational health, energy policy, or the myriad other complex substantive areas in which they must legislate. They acquire the necessary information by the familiar processes of public hearings before legislative committees.[200] There is no reason to think that procedural rulemaking is not equally suited to this process. Statutory obsolescence is a problem in procedure, but so is it a problem in virtually every complex area of legislation.[201]

Supreme courts, by contrast, have serious deficiencies as legislative bodies for procedure. First, their familiarity with the area can easily be overstated.[202] While many supreme court justices have been trial court judges, not all have. Furthermore, their duties on the appellate bench do little to provide them first-hand knowledge of the current needs of the trial courts. The practicing lawyers on legislative judiciary committees can have an equal or superior awareness of those needs.

The court as much as concedes this point by its reliance on the advisory committee in the rulemaking process. When the rules were first adopted, it was with few modifications of the advisory committee's proposed set of rules. In effect, then, the court is pro-

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199. *See* G. ETHRIDGE, *supra* note 183, at 27.

200. *See generally* J. HURST, DEALING WITH STATUTES, 7-8 (1982); H. LINDE, G. BUNN, F. PAFF, & W. CHURCH, LEGISLATIVE AND ADMINISTRATIVE PROCESSES 122-56 (2d ed. 1981).

201. G. CALABRESI, *supra* note 74, at 5-7.

202. This has been the position of several Justices of the United States Supreme Court. *See* 323 U.S. 821, 822 (1944) (Frankfurter, J.); 374 U.S. 865, 865-66; 869-70 (1963) (Black & Douglas, JJ.): and of at least one United States district judge. *See* J. WEINSTEIN, *supra* note 129, at 102.

viding little in the way of its own expertise in rulemaking;[203] it is primarily giving its approval to the decisions of the experts on the court's advisory committee. There is no reason to think that the supreme court is exclusively suited by its expertise to engage in this function.[204]

Furthermore, the court's competence in rulemaking is undermined by its function as the interpreter of rules. Once the court has approved the rules, it has taken a public position if favor of their validity; if confronted later in adjudication with a challenge to their validity, it will be very difficult for the court to be objective and impossible for it to appear so.[205] Courts have always denied that this effect is present,[206] but their actions demonstrate the contrary.[207]

It is true that in recent years courts have been in the forefront of procedural reform, following the model of the United States Supreme Court in its initial adoption of the Federal Rules;[208] and certainly the new rules are an improvement over the prior practice. However, in undermining the constitutional system of lawmaking, the court has created longer term difficulties. Procedural reform is a continuing process, and courts are not always the most forward-looking procedural reformers. Certainly, in the nineteenth century and before, courts stood in the way of the needed procedural reforms.[209] And in this century, the United States Supreme Court has at times been less than prompt in making important changes.[210]

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203. Justice Frankfurter also made this observation at a time when the U.S. Supreme Court was more deeply involved in the rulemaking process than it is now, 323 U.S. at 822. *See also* Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM L. REV. 435 (1958). Since the Judicial Council has assumed great authority, the Supreme Court's treatment of the rules has become even more perfunctory. 446 U.S. 997, 997-1001 (1980) (Powell, Stewart & Rhenquist, JJ.); 409 U.S. 1132, 1133, (1972) (Douglas, J.) 374 U.S. 865, 869-70 (1963) (Black & Douglas, JJ.). *See also* Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673 (1975); Lesnick, *The Federal Rule-Making Process: A Time for Reexamination*, 61 A.B.A. J. 579 (1975).

204. *See* Tate, *The Rule-Making Power of the Courts in Louisiana*, *24* LA. L. REV. 555 (1964).

205. J. WEINSTEIN, *supra* note 129, at 96-99; 374 U.S. 865, 870 (1963) (Black & Douglas JJ.). Lesnick, *supra* note 203, at 582; Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts*, 63 IOWA L. REV. 15, 78 (1977).

206. *See, e.g.*, Mississippi Pub. Corp. v. Murphree, 326 U.S. 438, 444 (1946); Petition of Tennessee Bar Ass'n., 539 S.W.2d 805, 808 (Tenn. 1976).

207. *See* Hanna v. Plumer, 380 U.S. 460, 471 (1965):

> When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided Erie choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

208. J. WEINSTEIN, *supra* note 129, at 83; Kaplan & Greene, *supra* note 1, at 252-53.

209. J. WEINSTEIN, *supra* note 129, at 83; Kaplan & Greene, *supra* note 1, at 252, 53.

210. *See supra* note 108.

In Mississippi, there are already ominous signs. The Rules as adopted are not the full Federal Rules. The rules governing class actions and shareholders' derivative suits[211] were never included, and the court later deleted the rule governing third party practice.[212] Both of these omissions undermine the central policy of the joinder provisions of the Federal Rules, which is to assure the determination of all aspects of a dispute in a single litigation.[213] Because of the existing rulemaking structure, the legislature could not make these needed amendments even if it chose to do so.

VI. JUDICIAL INDEPENDENCE

The other branch of the court's functional basis for asserting a rulemaking power is the need for judicial independence. This is a point emphasized time after time by courts and commentators,[214] and it is striking how often it can be repeated without examination. To see why the judicial independence rationale is misplaced, it is necessary to bear in mind exactly what is being claimed: the court is asserting supremacy in all aspects of procedural rulemaking, regardless of the merits of the rules in question. The legislature may enact procedural statutes; but the court may overturn them not only if they are found to be unfair or inefficient, but merely if it disagrees with them. And once it has done so, its action cannot be altered except by constitutional amendment. Is such a power necessary for preservation of judicial independence?

A. *Procedure and Judicial Independence*

"The essence of judicial independence . . . is the preservation of a separate institution of government that can adjudicate cases or controversies with impartiality."[215] The principal goal of judicial independence has always been to prevent the legislature and the executive from threatening judges' impartiality in decisionmaking.[216] To this end, most American constitutions give judges a lengthy term of office and prohibit reducing their com-

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211. *See* FED. R. CIV. P. 23 & 23.1.

212. *See* FED. R. CIV. P. 14.

213. F. JAMES & G. HAZARD, CIVIL PROCEDURE 452 (2d ed. 1977).

214. *See, e.g.*, J. WEINSTEIN, *supra* note 129, at 21: "[T]o deprive the judiciary or [sic] rulemaking authority is to mar its vital independence and impair its role as a guardian of due process." This commentator's section on "the evolution of an independent judiciary, *id.* at 34-44, is confined to questions of tenure and judicial review, both of which are beside the point of procedural rulemaking.

215. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 688 (1980).

216. *Id;* J. WEINSTEIN, *supra* note 129, at 34-44.

pensation during their tenure.[217] These devices prevent the coordinate branches of government from intruding on the decision of individual cases and on the interpretation of statutes and the constitution. They are inherent in the judging function and do not depend upon whether the judiciary article of the constitution makes the creation of the court in question mandatory or discretionary.[218]

Courts must have some control over procedure to protect the integrity of the judging function. They should not be required to act in a manner that is inaccurate, inefficient, or unfair to the parties. But this need to preserve the court's and the parties' interests does not require that the court be accorded supremacy across the entire range of choice in procedural rulemaking. In fact, the court already has all the authority necessary to protect these interests in the due process clauses of the state[219] and federal constitutions.[220] The "due process of law" incorporates the most basic elements of a fair and efficient system of adjudication developed in Anglo-American law since the Magna Carta.[221] In recent years, the United States Supreme Court has invalidated a number of civil procedural statutes in the area of provisional remedies—replevin, for example—that were found to be violative of due process.[222] And recently it invalidated a state statute authorizing service of pro-

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217. *See, e.g.*, U.S. CONST. art, III, § 1: "The Judges, both of the supreme and inferior Courts . . . shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." Compare MISS. CONST. art. VI, § 149, "The term of office of the judges of the Supreme Court shall be eight (8) years;" MISS. CONST. art VI, § 166: "The judges of the Supreme Court, of the Circuit Courts, and the Chancellors shall receive for their services a compensation to be fixed by law, which shall not be increased or diminished during their continuance in office."

218. The state constitution mandates the creation of the circuit and chancery courts, *See* note 27, *supra*, while the federal Constitution leaves creation of inferior federal courts to the discretion of Congress. One might argue that this distinction places the state's trial court of general jurisdiction beyond the control of the legislature on questions of procedure. *See* Franck, *supra* note 3, at 299 n.82. But the federal and state trial courts both exercise the judicial power of their respective sovereigns within their defined jurisdictions. It is this that determines their character as courts, not whether their creation is mandatory or discretionary. The Missisippi Supreme Court recognized this in *Newell* when it held that the statute in question was "an impediment to the administration of justice that can no longer be indulged in courts of constitutional origin and which should not be tolerated in courts otherwise ordained since all share a common purpose—the fair and efficient administration of justice." 308 So. 2d at 74. Similarly, the new rules apply not only to circuit and chancery courts but to county courts, whose creation is within the legislature's discretion. *See* MISS. R. CIV. P. 1; MISS. CONST. art. VI, § 172. This makes clear that the supreme court's judicial independence argument is based on its conception of the judicial power, not the status of the court to which the rules apply.

219. MISS. CONST. art, III, § 14. *See also* MISS. CONST. art. III, § 24.

220. U.S. CONST. amend. XIV, § 2.

221. J. ELY, *supra* note 193, at 14-21.

222. *E.g.*, Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972). *Compare* Holloway v. Jordan, 170 Miss. 99, 154 So. 340 (1934).

cess in forcible entry and detainer actions by posting.[223] Similarly, *Newell v. State* can be understood as essentially a due process case, in which the failure to instruct a jury on the requirement of proof beyond a reasonable doubt was found to deprive the defendant of one of the most basic protections of the criminal justice system.[224]

B. *Procedure and Popular Representation*

Due process thus defines the irreducible minimum beneath which procedural statutes may not go. But within the vast range of choice of procedural rules that do accord with due process, it is wrong to say that the legislature has a lesser interest than the courts.[225] It is entirely fallacious to equate (as the court did in *Newell*)[226] legislative prescription of judicial procedure with judicial prescription of legislative procedure. The state constitution specifically places the power of establishing rules for the conduct of the legislature in the legislature itself;[227] there is no similar delegation to the courts with respect to judicial procedure. In fact, where the state constitution does refer to questions of judicial procedure, it places the responsibility in the hands of the legislature.[228]

More important, the court's reasoning assumes that each branch of government has some abstract authority to control its own methods of operation.[229] It assumes that the legislature's sole business is to define substantive rights, and the court's business is not only to adjudicate those rights but to prescribe how they should be adjudicated. In this, it is reminiscent of Napoleon I's position:

> Nobody can have greater respect for the independence of the legislative power than I: but legislation does not mean finance, criticism of the administration,

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223. Greene v. Lindsey, ____U.S.____, 102 S. Ct. 1874 (1982).

224. In re Winship, 397 U.S. 358 (1970).

225. Pound, *supra* note 1, argues that nineteenth century lawyers, trained in an apprentice system, ceded procedure to legislatures because of an exaggerated sense of the importance of procedure.

226. 308 So. 2d at 77. The point has its roots in Pound's assertion that "no one supposes that the courts can impose their general ideas of fitness and propriety upon legislative procedure or executive procedure," Pound, *supra* note 1, at 601.

227. MISS. CONST. art. III, § 55.

228. *E.g.*, MISS. CONST. art. IV, § 90 (s) (legislature shall provide by general law for "Regulating the practice in courts of justice"); MISS. CONST. art. III, § 31 (legislature may provide for non-unanimous juries in circuit and chancery court) (Compare MISS. R. CIV. P. 48 (A)); MISS. CONST. art. VI, § 163 (legislation shall provide procedures for transfer of actions between circuit and chancery court).

229. Pound, *supra* note 1, at 601, "None of the coordinate and co-equal departments of our polity can do its work effectively if the minute details of its procedural operations, as distinct from the substantive law it applies or administers, are dictated by some other department."

> or ninety-nine of the hundred things which in England the Parliament occupies itself with. The legislature should *legislate*, i.e., construct good laws on scientific principles of jurisprudence, but it must respect the independence of the executive as it desires its own independence to be respected.[230]

Both this logic and the court's would virtually eliminate the legislature's power over the structure and operation of government. The traditional role of the legislature, however, has been to define the rules of organization for government, and rules of procedure are certainly of this kind.[231] The history of administrative procedure in this country since the New Deal demonstrates most clearly the need for political control over procedure as well as substance.[232] No government officer, even a judge, should be above the control, within constitutional limits, of his official actions by the elected representatives of the people.

Procedural rights may be important ones.[233] The most obvious examples along these lines are in criminal procedure, which is also within the area of the court's asserted authority.[234] But in the civil area as well, procedural protections have taken on the character of basic rights in the public mind.[235] Most obviously, the right to trial by jury was considered so crucial it was elevated to constitutional status.[236] Several procedural rules indirectly implicate the right to trial by jury.[237] For example, summary judg-

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230. *Quoted in* 1 F. HAYEK, *supra* note 132, at 130.

231. 1 F. HAYEK, *supra* note 132, at 124-25.

232. The New Deal agencies, when first constituted, combined the traditional governmental functions of prosecution and adjudication, with no internal constraints. The technique of fact-finding and adjudication appeared to be biased and haphazard. *See* S. BREYER and R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 26-28 (1979). A critical study of several agencies by the Attorney General's Committee of Administrative Procedure led ultimately to the adoption of the Administrative Procedure Act in 1946, which mandated certain fundamental procedures across all executive and independent agencies. *See* 5 U.S.C. §§ 551-576 (1976). (Ironically, one member of the committee who favored even greater legislative control over administrative procedure was Roscoe Pound. *See* Pound, *The Place of the Judiciary in a Democratic Polity*, 27 A.B.A. J. 133 (1941)). The recent controversy over the Federal Trade Commission has focussed mainly on its procedures rather than its substantive mission. *See generally* Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980).

233. *See generally* Curd, *Substance and Procedure in Rulemaking*, 51 W. VA. L.Q. 34 (1948); Levin and Amsterdam, *Legislative Control over Judicial Rulemaking: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 18-20 (1958). *But see* note 225, *supra*.

234. Levin and Amsterdam, *supra* note 233, at 18. Some of these were considered so important by the framers that they were embodied in the Bill of Rights: *See* U.S. CONST. amends. IV, V, and VI; MISS. CONST. art. III, §§ 21-23, 26, 27 and 29. These, however, are only the bare minimum. Non-constitutional rules may provide additional protections. The Connecticut court has been sharply criticized for invalidating an important statutory right to discovery on the ground it was "procedural" and therefore outside the legislature's authority. *See* J. WEINSTEIN, *supra* note 129, at 79 and Kay, *supra* note 1 (criticizing State v. Clemente, 166 Conn. 501, 353 A.2d 723 (1974)).

235. *See* MISS. CONST. art. III, § 25 (right to proceed *pro se* or by counsel) and § 24 (open courts).

236. *See* U.S. CONST amend. VII; MISS. CONST. art. III, § 31.

237. *See, e.g.*, MISS. R. CIV. P. 47-50.

ment[238]—to name one that has caused particular controversy in Mississippi[239]—may limit the number of issues presented to juries.[240] These are not mere technical rules that can be left to experts; they are rights that deeply affect the relationships of the citizens and the state, and as such should be within the ultimate control of the citizens' most direct representatives. Certainly, courts should contribute to rulemaking and perhaps they should have initial rulemaking responsibility.[241] But in any event the extent of their role should be within control of the electorate.

Procedural rules also implicate powerful economic and political interests. The clearest indication of this fact is the sharp division between the plaintiff's bar and defense bar in Mississippi over the merits of the rules. The constitution contemplates that the representative branch of government will resolve this kind of conflict. It is superficially appealing to argue that these questions should be taken out of politics and resolved on their merits; but this is an extraordinarily naive view of what has occurred. Transfer of these issues from the legislature to the court has not made the political conflict disappear; it has simply required the court to resolve it. It can only reduce the prestige of a court to be placed in such a position.

C. *The Interdependence of Substance and Procedure*

Even if we accept for the sake of argument that the legislature should be concerned only with substantive policy, it would be wrong to conclude that the legislature should not have final authority over rulemaking. There is no power over substantive law without a power over procedure. At early common law, when trial was by ordeal and by battle, there was no true substantive law; the judgment decreed the manner of trial, and the outcome was left to divine intervention.[242] Only with the rise of the jury did the law become concerned with the accuracy of the result in relation to some preestablished substantive norm.[243] And during the development of the common law, the procedural incidents of

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238. MISS. R. CIV. P. 56.

239. *See supra* note 59.

240. *See generally* Bauman, *The Evolution of the Summary Judgment Procedure*, 31 IND. L.J. 329 (1956). Of course, summary judgment has been used relatively sparingly in federal courts. McLauchlan, *An Empirical Study of the Federal Summary Judgment Rule*, 6 J. LEGAL STUD. 427 (1977).

241. *See infra* Section VII.

242. J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 62-63 (2d ed. 1979).

243. *Id.*

the various forms of action determined which were chosen by plaintiffs and ultimately the law's substantive content.[244]

In modern law, even though we now have "trans-substantive" codes of procedure which seem to apply equally to a simple action on a note and a massive antitrust litigation,[245] procedural rules can affect the development of the substantive law. For example, the availability of the class action has quite clearly affected the judicial interpretation of the requirements of Section 10(b) of the 1934 Securities Exchange Act and Securities and Exchange Commission rule 10(b)-5.[246] Interestingly, the Mississippi Supreme Court has chosen not to adopt the class action rule for the state version of the rules;[247] this alone is a judgment that will affect substantive rights in the state.

The point is not limited to class action, however. Virtually every important difference between procedural regimes may have an important effect on the development and scope of substantive rights. Loosening the requirements of specificity in pleading in negligence actions will tend to permit more cases to go to the jury, which in turn will affect the prevailing definition of negligence.[248] The increased use of special verdicts[249] will tend to confine jurors to fact determination and increase the role of the judge in the application of law to fact; lay and professional deciders may reach different results, particularly in cases in which popular prejudice is important.[250]

Thus, even the most purely procedural rule can affect the substantive policy of the right being enforced. But the problem

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244. *See generally* J. COUND, J. FRIEDENTHAL & A. MILLER, CIVIL PROCEDURE: CASES AND MATERIALS 339-58 (3d ed. 1980); F. MAITLAND, *supra* note 118. For example, trover displaced detinue as the action of choice for goods wrongfully detained because the latter action allows the defendant the right to wage his law. F. MAITLAND, *supra* note 118, at 58. This is the meaning of Maine's famous statement that "So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure." H. MAINE, EARLY LAW AND CUSTOM 389 (1901).

245. Cover, *Reading the Rules: Procedural Neutrality and Substantive Efficacy,* in R. COVER & O. FISS, THE STRUCTURE OF PROCEDURE 75 (1979).

246. *See* Comment, *The Impact of Class Actions on Rule* 10(b)-5, 38 U. CHI. L. REV. 337 (1971).

247. *See* MISS. R. CIV. P. 77-78

248. *Compare* Piggott v. Boeing Co., 240 So. 2d 63 (Miss. 1970), with MISS. R. CIV. P. form 15. *See also* Comment, *The Effect of Specific Allegations on the Application of Res Ipsa Loquitur,* 27 FORDHAM L. REV. 411 (1958).

249. *See* MISS. R. CIV. P. 49(b), advisory committee note. *See* 5 J. MOORE, FEDERAL PRACTICE 2217 (2d edition 1948); 374 U.S. 865, 867-68 (1963).

250. Kalven & Zeisel, *Reasons for Judge-Jury Disagreement* in R. COVER & O. FISS, THE STRUCTURE OF PROCEDURE 333 (1979); Kalven, *The Dignity of the Civil Jury,* 50 VA. L. REV. 1055 (1964).

of judicial rulemaking can become even more acute when the rules themselves implicate other substantive policies in their operation. Statutes of limitations, for example, are in part substantive; their purpose is not only to insure accurate and efficient determination of disputes, but also to set a limit on the scope of substantive rights and to give those subject to lawsuits a sense of release from obligation.[251] While the new Rules do not establish limitation periods, several of the Rules directly affect the calculation of statutory periods.[252]

Thus, the court's judicial independence argument contains a fallacy in its assumption that questions of substantive policy can be disregarded in the formulation of procedural rules. The line between substance and procedure, although it can be drawn in other contexts with some measure of success,[253] is unworkable as a means for defining legislative jurisdiction.[254] Too many procedural rules go beyond mere housekeeping and implicate important questions of policy to permit a satisfactory division of responsibility. There are two important negative implications of this difficulty. First, the legislature will be precluded from correcting a rule that alters a substantive policy. The New Mexico Supreme Court, to take a clear example, under its asserted rulemaking powers has revoked all statutory evidentiary privileges and prohibited the state legislature from enacting others.[255] Such an assertion of power conflicts with the virtually unanimous view that privileges are substantive, yet there is nothing short of a constitutional amendment that the legislature can do to correct the court's rule.

A less obvious, but no less real, danger is that the court will be too narrow in its rulemaking, failing to make important and needed reforms. The new Mississippi Rules, for example, do not include Federal Rule 35, which allows physical and mental examinations as a discovery device under defined circumstances. This rule has been found to be procedural and therefore valid under

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251. *See* Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974).

252. *E.g.*, MISS R. CIV. P. 3, 15(c).

253. *See* Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333 (1933); Ely, *supra* note 251.

254. Levin & Amsterdam, *supra* note 4, at 18-20. *See also*, Lynch, *The New Jersey Supreme Court and the Counsel Fees Rule: Procedure or Substance and Remedy*, 4 SETON HALL L. REV. 19 (1974); Note, *The Rulemaking Power of the Florida Supreme Court: The Twilight Zone Between Substance and Procedure*, 24 U. FLA. L. REV. 87 (1971); Curd, *Substance and Procedure in Rulemaking*, 51 W. VA. L.Q. 34 (1948).

255. J. WEINSTEIN, *supra* note 129, at 80.

the Federal Rules Enabling Act,[256] but the adoption of that rule was apparently thought by the Mississippi court to be beyond its constitutional authority. It is no answer to this objection that the legislature may adopt rules that have substantive elements while the court will confine itself to clearly procedural rulemaking. First of all, even the most clearly procedural rule can affect public policy. Most important, however, the answer assumes a highly inefficient division of rulemaking authority. The same entity must be empowered to consider the whole of procedural reform to ensure against ill-considered, piecemeal treatment of procedural issues.

VII. CONCLUSION

The foregoing argument is not merely the familiar one that the line between substance and procedure is difficult to draw; many lines are indistinct, yet courts must draw them. The point is that the line is irrelevant to a proper allocation of lawmaking supremacy between courts and legislatures. Many rules that are purely procedural for *Erie* or conflict-of-laws purposes nonetheless affect the scope of substantive rights or involve the balancing of important interests that is particularly suited to majoritarian bodies. The proper basis for a division of authority in lawmaking lies in the processes by which laws are made and in the heirarchy of norms that has always been the basis of American constitutionalism. Courts certainly must make law, including procedural law, but they should and do make law by the process of adjudication, which is the basis for their legitimacy as lawmaking bodies. Furthermore, court-made law must always be subject to legislation—the most direct voice of the electorate.

None of this is to deny that the judiciary should make a contribution to procedural rulemaking. Its role, however, should be subject to the ultimate authority of the legislature, and should conform to established standards of administrative procedure. A delegation of rulemaking authority to the supreme court subject to a legislative veto provision, along the lines of the current rulemaking act, would satisfy the requirement, although many others would do so as well.[257] It is not necessary, for example, that any legislative review be available before the effective date of a rule, so long as the rule is subject to legislative revision and

256. Sibbach v. Wilson & Co., 312 U.S. 1 (1941).

257. This is the primary conclusion of C. GRAU, *supra* note 4, at 14-21.

repeal.[258] It is also unnecessary, and perhaps not desirable, that the supreme court be the official promulgating body for the rules; a judicial council composed of supreme court justices, trial court judges, and practicing lawyers could have that authority.[259] In either event, however, the promulgating body should follow regular administrative rulemaking procedures, including notice and opportunity for comment to all affected constituencies. Such a rulemaking structure would assure adequate flexibility to deal with the ongoing demands of procedural reform, and yet preserve the legitimacy of the rulemaking process.

258. J. WEINSTEIN, *supra* note 129, at 107-115. A serious question now before the federal courts is whether certain legislative veto provisions are constitutional. Immigration and Naturalization Service v. Chadha, No. 80-1832 (U.S. Argued Dec. 7, 1982.)

259. *See supra* text accompanying notes 202-213.